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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1457

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1969, et al.,
Petitioners,

vs.

REBECCA BISE, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

International Brotherhood of Electrical Workers, AFL-CIO, Local 1969, Dick Cripe and Elsie M. Smith hereby petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, enabling this Court to review the opinion and judgment in Bise, et al. v. International Brotherhood of Electrical Workers, AFL-CIO, Local 1969, ... F.2d ..... (Sept. 24, 1979).

OPINIONS BELOW

The Opinion of the Court of Appeals appears in the Appendix hereto as Appendix A-1. The Court of Appeal's Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc appears in the Appendix hereto as Appendix B-1. The Judgment of the United States District Court for the Northern District of California, filed on February 7, 1977 (Appendix C-1, *infra*), the Order Pendente Lite, dated February 11, 1975 (Appendix D-1, *infra*), the January 9, 1976, Order of the District Court granting in part and denying in part petitioners' and respondents' motions for summary judgment (Appendix E-1, *infra*), the March 12, 1976, Order granting in part petitioners' motion for partial summary judgment (Appendix F-1, *infra*), the June 23, 1976, Order denying petitioners' motion for judgment notwithstanding the verdict, or in the alternative, for a new trial (Appendix G-1, *infra*), and the Opinion of the District Court regarding respondents' request for attorneys' fees, filed February 7, 1977 (Appendix H-1, *infra*), are all unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 24, 1979. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on December 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May punitive damages be awarded to union members under the Labor Management Reporting and Disclosure

Act where (a) the union trial board has found the members guilty of engaging in strikebreaking activities; or (b) the union has engaged in no egregious or violent conduct?

2. May a District Court conclude that a union trial board has improperly imposed fines against union members in violation of the LMRDA where substantial evidence was presented to the union trial board that the members had engaged in unprotected strikebreaking activities?

3. Under what circumstances does a District Court abuse its discretion in failing to require union members to exhaust internal appeal procedures provided by a union constitution?

4. Are compensatory and punitive damages allowable to union members under the LMRDA where there is no evidence of consequential damage?

STATUTES INVOLVED

This case involves the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401, *et sequitur*. Particularly pertinent are 29 U.S.C. § 411(a)(2), § 411(a)(4), § 411(a)(5) and § 411(b); 29 U.S.C. § 412; 29 U.S.C. § 529; and 29 U.S.C. § 530. Also pertinent are sections 7, 8(b)(1) and 8(b)(2) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 157, 158(b)(1) and 158(b)(2), respectively. These statutory provisions are all attached as Appendix I, *infra*.

STATEMENT OF THE CASE

This action was brought on January 8, 1975, by nine members of petitioner Local 1969, seeking injunctive relief and damages against Local 1969 and two business represen-

tatives for alleged wrongful discipline imposed by a Local 1969 trial board following an economic strike at Precision Plastics, Inc., employer of all the respondents.

Nearly all of the Precision Plastics employees (RT 158) were in attendance on July 14, 1974, when the union's negotiators presented the company's final proposal to the employees. The proposal was overwhelmingly rejected, and by secret ballot the employees voted to strike (RT 157-158)[1]

The strike, sanctioned in accordance with the union's constitution, began on July 15. All of the respondents except respondent Claude Stones initially participated. Some of the respondents engaged in picketing. Employees were provided pay for picket duty and strike benefits, and the union attempted to provide additional financial aid to employees who requested assistance (RT 291-294, 374, 386, 677-678, 728-729, 733, 755, 784-785).

Respondent Claude Stones crossed the picket line daily and continued to work throughout the strike.[2] Petitioner Elsie Smith filed charges against Stones on July 30 while

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[1]RT references herein refer to the Reporter's Transcript, part of the record on file with the Court of Appeals.

[2]Claude Stones never resigned from the union but instead applied for a "withdrawal card" (RT 176, 193, 200). Article XXVI of the International Union Constitution provides: "A member on a withdrawal card may be subject to charges, trial and appropriate penalty in accordance with the provisions of this Constitution." (Pet. Exh. No. 1000, p. 97). The District Court properly instructed the jury that a member who holds a withdrawal card is subject to union discipline (RT 886).

In addition to crossing the picket line, Stones also met secretly with the company president and circulated reports among union members that the company would never agree to a union contract proposal for a grievance arbitration clause (RT 190, 653-659).

the picketing continued. During the course of the strike, union negotiators received reports from striking employees that some other members were planning to cross the picket line, and that they had been asking other members to join them. Similar reports were received from company representatives during negotiations (RT 474-475, 722-725). On July 26, the union sent a news bulletin to all striking employees, including respondents, warning that any members who engaged in strikebreaking activities would be charged and tried for violating provisions of the union's constitution (Pet. Exh. No. 1,019).[3]

On July 31, the union held another membership meeting attended by respondents Bise, Bradley, Carr, Kaona, Klatt, Ornellas, Pappas and Maxine Stones, to discuss the progress of the strike. None of the respondents spoke in favor of terminating the strike, or in favor of any other alternative solution (RT 274-285, 325, 730, 850, 859). At the conclusion of the meeting another secret ballot strike vote was taken and the members voted to continue the strike by more than two-thirds majority vote (RT 730, Appendix J) During the meeting all members were advised of the provisions of the International Union Constitution governing union member conduct during a strike (RT 468, 481-483, 511).

Immediately following the July 31 meeting, four of the respondents (Klatt, Bise, Ornellas and Kaona) crossed the picket line, entered the plant and spoke to the company general manager, who was waiting at the

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[3]References to Respondents' Exhibits (Resp. Exh.) and Petitioners' Exhibits (Pet. Exh.) are exhibits filed with the District Court, which are part of the record before the Court of Appeals.

door.[4] Thereafter, all four prepared resignation letters which were received by the union on August 5 (RT 306, 336, 340, 350).[5]

Respondent Dan Carr's letter of resignation to the union, dated August 6, was received August 7. Carr's pre-resignation conduct included a visit with the company president in Carr's home, at which time arrangements were made by Carr with the company president for two of Carr's friends, who were not union members, to work during the strike (RT 390, 395, 402, 409).[6]

Respondent Victoria Pappas negotiated her return to work with the company president on August 9 (RT 681). She was referred to respondent Klatt, who had already returned to work. Klatt prepared a resignation letter for Pappas which was received by the union on August 12 (RT 682). Although there was no evidence that respondents Stella Bradley and Maxine Stones crossed the picket line before they resigned, both dealt with the employer before they submitted their resignation letters to the union (RT 424-426, 681, 701-702).[7]

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[4]Some of the respondents claimed they had permission to cross the picket line on July 31 and pick up vacation checks. No such permission was given by the union or by the picketeers on duty (RT 256, 765-768). Later, at trial, three of the four respondents admitted they had received their vacation checks before they entered the plant on July 31 (RT 254-257).

[5]Additional evidence of pre-resignation conduct by these four respondents is contained in Appendix J, and in the record below at RT 254-255, 260, 302-306, 351-353, 378, 722-727, 764, 807.

[6]Additional pre-resignation conduct of Carr is found in Appendix J and at RT 390, 395, 402-405, 745-746, 761-762.

[7]Respondent Maxine Stones was charged with having knowledge of and failing to report violations known to her of a strikebreaking plan (RT 136; Appendix J). Respondent Bradley was charged with having knowledge of and failing to report the strikebreaking plan, and with working with company officials (RT 412, 419).

Individual charges were filed against respondent Claude Stones by petitioner Smith on July 30, and a union trial board hearing was held on August 29. Stones was properly notified but did not appear. The trial board convicted Stones of improperly crossing the picket line during the strike and fined him $1,500, of which $250 was suspended. (Appendix J).

In the meantime, the strike was settled and the contract ratified on August 16. The remaining respondents were directed to rejoin the union immediately and did rejoin. Charges against these eight respondents were filed by Petitioner Cripe on September 5, after they rejoined the union.[8]

The September 5 charges alleged various violations of the union constitution, including the unauthorized crossing of picket lines prior to their resignation from the union, working in concert with the struck employer, engaging in activity to undermine the effectiveness of Local 1969 as the collective bargaining representative of Precision Plastics employees, reporting union business to the employer and soliciting strikebreakers on behalf of the employer (Appendix A, Appendix J).

Each of these respondents was then tried before a trial board, consisting of union members who were not members of the unit employed at Precision Plastics (RT 772-775, 787-893; Appendix A, fn. 10). Following hearings on October 9, the trial board found respondents Pappas, Klatt, Bise and Maxine Stones guilty of the charges lodged against them. Maxine Stones was found not guilty of mak-

[8]Charges against these eight respondents that had been filed by petitioner Smith after they had resigned, but before they had rejoined the union, were dropped on advice of counsel.

ing known to others the business of the local union (Appendix J).

Respondents Ornellas, Kaona and Carr were found guilty of the charges lodged against them following the trial board hearings on October 10. Ornellas and Carr did not attend their trial board hearings. Respondent Bradley was found guilty of the charges lodged against her on November 7, 1974 (Appendix J). Bradley also did not attend her hearing.

An unfair labor practice charge against the union was filed under Section 8 of the National Labor Relations Act by respondent Carr on October 18. On November 19, 1974, the NLRB Regional Director notified Carr that he was refusing to issue a complaint.[9] That determination was never appealed. The union trial board decisions were also not appealed.[10]

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[9]The charge was investigated by Region 20 of the National Labor Relations Board. In a letter to respondent Carr, Regional Director Roy O. Hoffman explained:

> The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.
>
> The investigation disclosed that the fines levied against the employees by the Charged Union were based upon conduct engaged in by those employees while they were members of the Charged Union. In these circumstances, the Charged Union's conduct is covered by the proviso to Section 8(b)(1)(A) of the Act, which has been held to permit unions to fine members and therefore does not constitute a violation of the Act. I am, therefore, refusing to issue complaint in this matter. (Pet. Exh. No. 1,015)

[10]The appeal procedure was set forth in writing in Decisions mailed to each respondent (Pet. Exhs. Nos. 1005E-1013E). It provided for an Appeal to the International Vice President within forty-five days, following the Decision of the Trial Board (Pet. Exh. No. 1,000).

In their United States District Court complaint, respondents alleged, *inter alia,* that they were disciplined by their union for engaging in protected rights of free speech and assembly, in violation of the LMRDA, 29 U.S.C. § 411(a)(2), that said charges were filed and fines imposed, in violation of the due process requirements of 29 U.S.C. § 411(a)(5), and that petitioners intentionally inflicted mental distress upon respondents.

Prior to the trial the District Court determined that there were no procedural or due process violations and dismissed the Section 411(a)(5) allegations (Appendix E). The Section 411(a)(2) allegations and the related State cause of action for intentional infliction of emotional distress were then heard before a jury.

The District Court determined that the evidence should be limited to an examination of petitioners' conduct relating to the filing of the charges rather than an examination of the conduct of respondents for which disciplinary fines were actually imposed.[11] Respondents argued below that petitioners Cripe and Smith did not investigate their charges before they were filed and presented to the trial board and that

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[11]The trial court instructed the jury that the testimony of John Knezevich, president of the trial board, was hearsay, regarding the reasons for the discipline imposed by the trial board (RT 797, ln. 11-RT 798, ln. 1). The trial court further admonished Knezevich that it wanted him to testify only in general, summary fashion, and did not want him to explain the specific conduct or reasons for which discipline was imposed upon each of the individual respondents (RT 804, lns. 11-17). The trial court also excluded the official trial board hearing minutes (Appendix J) as hearsay (RT 226-236) and restricted direct testimony from the witnesses who testified before the trial board, including petitioner Cripe, on the grounds that said testimony was cumulative to the hearsay testimony of Knezevich (RT 861-862).

respondents were disciplined for resigning from the union (Resp. Brief below, pp. 13-17).

The jury returned a verdict in favor of petitioners dismissing all the allegations of intentional infliction of emotional distress, but rendered a general verdict in favor of respondents. The jury awarded all respondents various compensatory damages in the total amount of $4,851[12] and total punitive damages in the amount of $80,000. On remittitur, the court entered judgment against petitioners for compensatory damages in the amount of $4,851, punitive damages in the amount of $20,000, added attorneys' fees in the amount of $20,000, and issued a permanent injunction prohibiting petitioner Local 1969 from enforcing the union fines against all the respondents.

Relying upon *NLRB v. Granite State Joint Board, Textile Workers Union,* 409 U.S. 213 (1972) and *Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB,* 412 U.S. 84 (1973), both of which concerned violations of Sections 8(b)(1) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. § 158, the Court of Appeals affirmed the judgment entered by the trial court, holding that petitioner Local 1969 had wrongfully fined respondents in violation of their protected rights of free speech and association under Section 101 of the LMRDA, 29 U.S.C. § 411(a)(2). The Court of Appeals declined to state what evidence, if any, was

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[12]Except for respondent Claude Stones, who received one dollar, the compensatory damages awarded by the jury to the eight other respondents equaled the amounts that the union trial board had imposed as fines against each respondent. These fines had never been collected by the petitioner. An Order Pendente Lite (Appendix D) had been issued restraining any attempted enforcement shortly after respondents filed this action. The jury was not aware of this order.

sufficient to justify the jury's finding of a violation of respondents' right of free speech and assembly under the LMRDA.[13]

The Court of Appeals upheld all the punitive damages awarded by the District Court but vacated the compensatory damages of five respondents, holding that an award of compensatory damages for being angry, nervous, upset or depressed, without proof of any actual injury, was not recoverable under the remedial provisions of Section 102 of the LMRDA, 29 U.S.C. § 412. The compensatory damages of respondents Bise, Pappas, Maxine Stones and Kaona were affirmed, the court holding that "there was sufficient evidence of causal connection between the union's conduct and the actual injuries allegedly sustained by each of the[se] plaintiffs to present a jury question." (Court of Appeals' Opinion, Appendix A.)

The evidence to which the Court referred was as follows: respondent Bise allegedly became so upset when she was handed a copy of the charges against her that she broke a die and was thereafter disciplined by her employer.[14] Respondent Pappas was allegedly damaged when she became so angered when she was handed a copy of the charges that she waited five minutes to open them. Pappas allegedly then missed work because of headaches and heart palpitations she experienced after being handed the charges.[15]

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[13]The Court of Appeals stated "The facts relating to each of the charges have been exhaustively discussed in the briefs. We do not repeat them here." (Court of Appeals' Opinion, Appendix A).

[14]Respondents' Responsive Brief, p. 33.

[15]Respondents' Responsive Brief, p. 35.

Respondent Maxine Stones allegedly was damaged because she became jumpy, nervous and started shaking when petitioner Cripe handed her the charges. She said she became nervous and upset whenever she thought about the fine that was later imposed on her.[16] Respondent Frances Kaona also allegedly became nervous and upset, and "because of high blood pressure" she allegedly ate more and gained weight.[17] No doctor was called to support any of respondents' claims.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS' DECISION APPROVING AN AWARD OF PUNITIVE DAMAGES INVOLVES ISSUES RAISED (BUT NOT RESOLVED) IN FOUST, WHICH URGENTLY NEED RESOLUTION BY THIS COURT.

This Court has on a number of occasions determined that punitive damages are not recoverable under remedial provisions of federal labor law. *IBEW v. Foust,* ..... U.S. ....., 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979); *Local 20, Teamsters Union v. Morton,* 377 U.S. 252 (1964); *Republic Steel Corp. v. NLRB,* 311 U.S. 7 (1940); *Local 60, Carpenters v. NLRB,* 365 U.S. 651, 655 (1961); *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 185 (1940). In holding punitive damages to be inappropriate in *Foust,* this Court declared that the fundamental purpose of fair representation suits is to compensate for injuries caused by violations of employee rights (*id.* at 99 S.Ct. 2126).

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[16]Respondents' Responsive Brief, p. 35.

[17]Respondents' Responsive Brief, p. 34.

Speaking for the Court, Justice Marshall declared that general labor policy disfavors punishment. Because the adverse consequences of punitive damage awards could be substantial, inflicting the risk on employees whose welfare depends upon the strength of their union was too great a risk for whatever deterrent effect punitive damages may have. Justice Marshall further declared:

> Absent clear congressional guidance, we decline to inject such an element of uncertainty into union decisions regarding their representative functions.
> *IBEW v. Foust* at 99 S.Ct. 2128.

As this Court pointed out in *Foust,* it has not as yet addressed itself to the application and interpretation of LMRDA with respect to the punitive damage issue.[18] Justice Blackmun in discussing *Morton* in his concurring opinion in *Foust* noted that there is a distinction to be drawn between the judicially established principle of remedy for failure to fairly represent and a statutorily established remedy as is the case under the Landrum-Griffin Act. In the latter instance the intent of Congress becomes important.[19]

In view of these comments by this Court in *Foust,* it is appropriate that the legislative history of the LMRDA be considered. In opposing the original draft of the Landrum-Griffin bill, Senator Wayne Morse feared that one day the very situation presented in this case could result. Senator Morse declared:

> .... Under these provisions, union officers can be sued by a union member who has been ejected from a meet-

[18] *Foust,* 99 S.Ct. 2121, 2125, fn. 9.
[19] *Foust,* 99 S.Ct. 2121, 2130.

> ing or who has been disciplined for leading a back-to-work movement in the midst of a strike if this officer's action does not appear to be reasonable in the circumstances to the court . . . .
>
> Legislative History of the LMRDA of 1959, Vol. II, p. 1414, col. 3.

In reply, Senator Morse's colleagues, the sponsors of the LMRDA, repeatedly stated that such a result was *not* intended and that punitive damages should not be recoverable.[20]

The Honorable Phil M. Landrum and Robert P. Griffin, at the time they introduced their substitute bill, later to become the LMRDA, declared in House Report No. 741 on House Resolution 8342: "The substitute bill is moderate but effective. It is not punitive or extreme." (Legislative History of the LMRDA of 1959, Vol. I, pp. 857-858.) Griffin and Landrum went on to say, "The substitute [in Sections 609 and 610] restores the sense of the Senate passed provision but makes it clear that criminal sanctions apply only when rights are denied through the use of force or violence (*id.*)."

Senator Karl Mundt, the vice chairman of the McClellan Committee, during the debate on the Joint House-Senate Conference Report on the LMRDA, as enacted, declared:

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[20]See *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. 612 (1967); *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) (statements by sponsors regarding legislative intent to be given primary attention).

In *Morton*, this Court reviewed a similar dialogue between Senator Morse and Senator Robert Taft in determining the propriety of punitive damages under the Taft-Hartley Act (*id.* at p. 261, fn. 16).

"I think it should also be made perfectly clear, Mr. President, that this is not punitive legislation." (Legislative History, *supra*, at Vol. II, p. 1448.)[21]

The Courts of Appeals have divided on the propriety of punitive damages under the LMRDA.[22] All of the Courts of Appeals' decisions that have previously upheld punitive damages under the LMRDA have involved factual settings

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[21]See also statements of Representative James O'Hara of Michigan on comparing the Landrum-Griffin Bill to the Elliott Bill it replaced:

> "These rights are enforced effectively and fairly by civil actions in the Federal courts. In such suit the court can award money damages to compensate any loss suffered by a member through denial of any of the enumerated rights and can enjoin any repetition of actions which deprive the member of his rights."
>
> Leg. History, *supra*, Vol. II. p. 1632.

Representative Carl Elliott also testified to the remedial intent of a predecessor section:

> "Thus a suit to prevent and restrain a violation of the so-called bill of rights might terminate in an injunction, but also in an *order setting* aside discipline imposed by a labor organization, and *restoring* the plaintiff to membership if appropriate, and *awarding monetary damages if suffered.* Leg. History, supra, Vol. II, p. 1584 (emphasis supplied).

[22]Cf. the Fifth Circuit's decision in *International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193 (5th Cir. 1968), *cert. denied*, 391 U.S. 935, the Second Circuit's decision in *Morrissey v. National Maritime Union*, 544 F.2d 19 (2d Cir. 1976), the Ninth Circuit's decision in *Cooke v. Orange Belt Dist. Council*, 529 F.2d 815 (9th Cir. 1976), the Fourth Circuit's decision in *Simmons v. Avisco, Local 713 Textile Workers Union of America*, 350 F.2d 1012 (4th Cir. 1965), the Fifth Circuit's decision in *Nix v. Fulton Lodge No. 2, International Ass'n. of Machinists*, 262 F.Supp. 1000, modified 415 F.2d 212 (5th Cir. 1969) cert. denied, 406 U.S. 946 (1972) and the Sixth Circuit's decision in *McCraw v. United Ass'n. of Journeymen and App. Plumbing*, 341 F.2d 705 (6th Cir. 1965).

In 1978, the United States District Court for the Northern District of Ohio discussed the split in the Circuits and denied punitive damages under the LMRDA, holding that it was bound by the Sixth Circuit's *McCraw* decision. *Murphy v. Operating Engineers, Local 18*, ... F.Supp. ...., 99 LRRM 2041, 2131 (N.D. Ohio 1978).

relating to members' participation in the internal affairs of a union. None have involved union members' conduct which opposed the collective decisions of all bargaining unit employees during an economic dispute with an employer. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).[23]

An improper union fine against a member for resigning and returning to work may subject a union to remedial relief under *Granite State, Joint Board* and *Booster Lodge No. 405*, but does not subject it to punitive damages, *Phelps Dodge, supra*; *Republic Steel Corp., supra.* No reason suggests itself why punitive damages unavailable under the NLRA should be awarded under the LMRDA for identical proscribed conduct if a careful balance between individual and collective interests is to be maintained.

The Court of Appeals' decision below, upholding an award of punitive damages in an LMRDA case, not only is inconsistent with legislative history and with the principles enunciated by Justice Marshall in *Foust,* it is also in conflict with the *Foust* concurring opinion of Justice Blackmun. Respondents argued to the Court below that a punitive damage award was justified because Local 1969 had disciplined respondents for resigning and returning to work during a strike (Resp. Brief on Appeal, pp. 8, 9, 11-16). Respondents also argued that Petitioners Cripe and Smith failed to investigate before submitting the charges

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[23] *Braswell,* cited in all the recent decisions, did not discuss the congressional debate discussed herein but relied on state court decisions that had upheld punitive damages under New York State law (*id.* at 199). The *Braswell* court believed that nothing in the legislative history touches on the question (*id.* at 200).

to the union trial board (*id.* at 37).[24] Even if true, this conduct was not egregious, outrageous or exceptional (see, e.g., Blackmun's concurring opinion in *Foust* at 2132). Nor was there any violent conduct which would invoke the specific penal provisions of Section 609 of the LMRDA, 29 U.S.C. § 529.

In light of the foregoing, the determination of whether punitive damages may be allowed under the LMRDA and under the facts of this case is an important and far-reaching question of law.

II. THE DECISION BELOW ESTABLISHING A VIOLATION OF SECTION 101(a)(2) AND ADOPTING A STANDARD OF REVIEW OF UNION TRIAL BOARD DECISIONS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER COURTS OF APPEALS.

Relying upon *Granite State Joint Board* and *Booster Lodge*, the Court below affirmed the judgment entered by the trial court that petitioner Local 1969 wrongfully fined respondents in violation of their protected rights of free speech and association under Section 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2):

> There is substantial evidence in the record that in fact it was the plaintiffs' post-resignation return to work that prompted the fines. Moreover, the charges included pre-resignation conduct that was clearly within the protection of the LMRDA. We therefore find that the

[24] As discussed in Section II, *infra*, there was no evidence that the union trial board engaged in any conduct proscribed by the LMRDA. There was substantial evidence presented to the union trial board that respondents participated in unprotected conduct prior to submitting their resignations to the union.

> jury could reasonably arrive at the conclusion that it was the Union's purpose to punish the plaintiffs for resigning and returning to work.
>
> (Appendix A, p. 5.)

This Court held in *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233 (1971), that when union members are charged and fined for engaging in activities allegedly protected by the LMRDA, the responsibility of the court is to determine whether there was *some* evidence of misconduct presented to the union trial board. The Court of Appeals' decision below, which relies in part on the Second Circuit's opinion in *NLRB v. Teamsters, Local 294*[25] appears to alter the *Hardeman* standard of review. This court had said in *Hardeman:*

> III. There remains only the question whether the evidence in the union disciplinary proceeding was sufficient to support the finding of guilt. Section 101(a)(5)(C) of the LMRDA guarantees union members a "full and fair" disciplinary hearing, and the parties and the lower federal courts are in full agreement that this guarantee requires the charging party to provide some evidence at the disciplinary hearing to support the charges made [footnote omitted].
>
> • • •
>
> Senator Kuchel, who first introduced the provision, characterized it on the Senate floor as requiring the "usual reasonable constitutional basis" for disciplinary action, 105 Cong. Rec. 6720 (1959), and any lesser

[25] *NLRB v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 470 F.2d 57 (2d Cir. 1972) involved a review by the Circuit Court of Appeals of a decision of the National Labor Relations Board finding a violation of Section 8(b)(1)(A) of the National Labor Relations Act.

> standard would make useless § 101(a)(5)(A)'s requirement of written, specific charges. A stricter standard, on the other hand, would be inconsistent with the apparent congressional intent to allow unions to govern their own affairs, and would require courts to judge the credibility of witnesses on the basis of what would at best be a cold record [footnote omitted].
>
> *Boilermakers v. Hardeman*, 401 U.S. 246-247.

The standard of review applied by the Court of Appeals below is also in conflict with the standard of review applied in *Reyes v. Laborers Union, Local 16*, 464 F.2d 595 (10th Cir. 1972). *Reyes* holds that the trial court must uphold the union's findings if it is supported by *any* evidence produced at the disciplinary trial board which made a fair and impartial determination of guilt.

The holding of the Court below effectively undermines union trial board proceedings by allowing members who have been disciplined[26] thereafter to challenge the action through a trial *de novo* in the District Court simply by alleging a violation of LMRDA Section 101(a)(2) "freedom of speech" rights. A distinction drawn between alleged Section 101(a)(2) and 101(a)(5) violations[27] would appear to be contrary to the holding and reasoning of this Court in *Hardeman* when the issue before the Court relates to whether or not a union trial board has improperly imposed discipline against a union member.

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[26]This Court has consistently declared that the federal labor policy favors the power of a chosen union to protect against erosion of its status by imposing reasonable discipline. *Allis-Chalmers, supra*, 388 U.S. 175, 181.

[27]See *Teamsters Local 294, supra.*

Finally, important questions of law are presented which require resolution by this Court concerning whether or not discipline for "resigning and returning to work" constitutes an actionable violation under the LMRDA, and whether or not the various personal complaints testified to by respondents at trial and which were unrelated to action of the union trial board justified any compensatory damage award under the LMRDA.

III. RESPONDENTS' FAILURE TO EXHAUST INTERNAL UNION APPEALS UNDER LMRDA SECTION 101(a)(4) RAISES IMPORTANT QUESTIONS OF LAW.

While exhaustion of internal union remedies lies within the sound discretion of the trial court, petitioners respectfully submit that the trial court abused that discretion in this case by excusing respondents from exhausting their internal union remedies. In addition, the Court of Appeals failed to provide criteria against which a reasonable review of the trial court's discretion could occur.[28]

The determination of the trial court that it should immediately assert its jurisdiction without regard to the exhaustion of remedies requirement (RT 7, lns. 8-20; RT 16, lns. 7-14) where Section 101 allegations have been made is not supportable unless actual interference with those rights is imminent. *Harris v. International Longshoremen's Assn. Local 129,* 321 F.2d 801 (3d Cir. 1963)

---

[28]The Court of Appeals declared:

> Therefore, when, as here, the plaintiffs have raised issues that are in the public domain and beyond the internal affairs of the union, the union's internal procedures may be inadequate. [footnote omitted]
>
> (Appendix A, p. 4.)

and *Wigglesworth v. Teamsters, Local 592,* 552 F.2d 1027 (4th Cir. 1976). In these proceedings, no fines were collected or paid. Respondents were under no threat of removal from union membership, and the union was not interfering with the right of the respondents to actively participate or speak in regard to the internal affairs of the union (RT 130, 157-158, 160, 595, 858-860). *Buzzard v. Local Lodge 1040,* 480 F.2d 39 (9th Cir. 1973).

Respondents complained to the Court below that exhaustion should not be required because the union had sent letters threatening respondents with legal action if they did not pay the fines.[29] The evidence shows that letters were sent to the respondents following dismissal by the Regional Director of a charge against the union (p. 8, *supra*). The union thereafter did file one lawsuit to collect the fine imposed against Claude Stones.

The letters, however, were all sent *after* the respondents had refused to pursue their appellate remedies even though each respondent had been advised in writing concerning these remedies (*cf.* Pet. Exhs. No. 1,005-E to 1,013-E with Pet. Exhs. No. 1,005-F to 1,013-F).[30] Moreover, the letters and the lawsuit against respondent Claude Stones did not interfere with the respondents' freedom of speech or with their right to participate in the internal affairs of the union.

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[29]Respondents' Brief below, pp. 27-31.

[30]The attorney for the respondents contacted the attorney for the petitioners and requested an extension of time to file an appeal. He was specifically directed to request an extension of time from the union's International Vice President (RT 14, lns. 6-23), as provided in the union's constitution. No request for an extension was thereafter submitted to the International Vice President.

In *Detroy v. American Guild of Variety Artists,* 286 F.2d 75 (2d Cir. 1961), the Second Circuit emphasized that courts should not step in until unions are given the opportunity to take corrective action. *Id.* at 79. The circumstances of the instant case strongly suggest the need for clear guidelines that govern a trial court's intervention prior to a union member's exhaustion of remedies available under a union constitution.

CONCLUSION

It is respectfully submitted that the failure of the Court below to apply principles of law established by the decisions of this Court and by other Circuit Courts of Appeal requires that the Court grant certiorari. If allowed to stand, the decision of the Court of Appeal below will impair substantially the decisions of this Court and of the Circuit Courts, and cause an erosion of fundamental principles enacted by Congress into federal labor law.

For all the reasons stated in this petition, a writ of certiorari should be issued to review the judgment and opinion of the Court below.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 18 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1457

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO Local 1969, et al.,
Petitioners,

vs.

REBECCA BISE, et al.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX

A

Opinion of the Court of Appeals, Ninth Circuit, entered on September 24, 1979

B

Order of the Court of Appeals, Ninth Circuit, on Petition for Rehearing and Petition for Rehearing En Banc, entered on December 19, 1979

C

Judgment on General Verdict of the District Court for the Northern District of California, dated February 7, 1977

D

Order Pendente Lite of the District Court for the Northern District of California, dated February 11, 1975

E

Reporter's Transcript of Hearing of January 9, 1976, in the District Court for the Northern District of California

F

Reporter's Transcript of Hearing of March 12, 1976, in the District Court for the Northern District of California

G

Reporter's Transcript of Hearing of June 23, 1976, in the District Court for the Northern District of California

H

Opinion of the District Court for the Northern District of California, entered on February 7, 1977

I

Statutes:

29 U.S.C. § 411(a)(2)
29 U.S.C. § 411(a)(4)
29 U.S.C. § 411(a)(5)
29 U.S.C. § 411(b)
29 U.S.C. § 412
29 U.S.C. § 529
29 U.S.C. § 530
29 U.S.C. § 157
29 U.S.C. § 158(b)(1)
29 U.S.C. § 158(b)(2)

J

Trial Board Hearing Minutes, dated August 29, 1974, October 9, 1974, October 10, 1974, and November 7, 1974

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

Rebecca Bise, Stella Bradley, Dan Carr, Frances Kaona, Wil Klatt, Lillian Ornellas, Victoria Pappas, Maxine Stones and Claude Stones, Plaintiffs-Appellees, vs. International Brotherhood of Electrical Workers, AFL-CIO Local 1969, Dick Cripe, Elsie M. Smith, and Does I through XXV, Defendants-Appellants.	No. 77-2386
Rebecca Bise, Stella Bradley, Dan Carr, Frances Kaona, Wil Klatt, Lillian Ornellas, Victoria Pappas, Maxine Stones and Claude Stones, Plaintiffs-Appellants, vs. International Brotherhood of Electrical Workers, AFL-CIO Local 1969, Dick Cripe, Elsie M. Smith, and Does I through XXV, Defendants-Appellees.	No. 77-2405

[Filed Sept. 24, 1979]

OPINION

On Appeal from the United States District Court
for the Northern District of California

Before: KILKENNY and ANDERSON, Circuit Judges, and JAMESON,* District Judge.

ANDERSON, Circuit Judge:

This action was brought by nine members of the defendant Union, the International Brotherhood of Electrical Workers, Local 1969, under provisions of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411 et seq., seeking injunctive relief and damages for the allegedly wrongful discipline imposed on them by the Union.

The plaintiffs were all Union members and employees of Precision Plastics, Inc., at a time when a strike was sanctioned against Precision. During the strike the plaintiffs resigned from the Union and returned to work. After the strike had been settled, and the plaintiffs had rejoined the Union, the plaintiffs were charged with conduct in violation of the Union constitution. The charges included the unauthorized crossing of picket lines prior to resignation from the Union, working in concert with the struck employer, and engaging in activity to undermine the Local as the collective bargaining representative of Precision's employees. The Union trial board found the plaintiffs guilty as charged and fines were assessed. The Union then filed suit for collection of the fines from one plaintiff in state court. Thereupon, the plaintiffs brought this action alleging that the behavior for which they had been disciplined was protected under section 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2), which protects Union members' First Amend-

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

ment rights of free speech and assembly, and that the fines were imposed in violation of the due process requirements of section 101(a)(5) of the LMRDA, 29 U.S.C. § 411(a)(5).

At trial the court granted the Union summary judgment on the issue of whether the Union had complied with the procedural requirements of section 101(a)(5). The 101 (a)(2) issue was heard by a jury, which answered special interrogatories submitted by the court and also rendered a general verdict in favor of the plaintiffs. The jury awarded the plaintiffs $4,851 for compensatory damages and $80,000 for punitive damages. Thereafter, the court reduced the amount of punitive damages awarded to $24,851, and plaintiffs accepted the remittitur. The trial court then awarded the plaintiffs $20,000 in attorneys' fees and issued a permanent injunction prohibiting the Union from enforcing the Union fines against the plaintiffs. The Union has appealed and the plaintiffs have cross-appealed. We have jurisdiction under 28 U.S.C. § 1291.

On appeal the Union argues that:

1. the district court erred in not requiring the plaintiffs to exhaust their intra-union remedies;

2. the evidence was insufficient to support the jury's verdict;

3. the awarding of compensatory damages was improper;

4. the awarding of punitive damages was improper; and

5. the awarding of attorneys' fees was improper.

In its cross-appeal the plaintiffs argue that:

1. the district court erred in finding that there was no violation of their section 101(a)(5) due process rights; and

2. the award of attorneys' fees was inadequate.

DISCUSSION

Exhaustion of Intra-Union Remedies

In its motion for summary judgment, the Union argued that the plaintiffs failed to exhaust their intra-union remedies in accordance with section 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4).[1] The district court denied this motion, and the Union raises the same issue on appeal.

It is well-established that the requirement of exhaustion of union remedies is a matter within the sound discretion of the courts.[2] *NLRB v. Industrial Union of Marine and Shipbuilding Workers of America,* 391 U.S. 418, 425-426 (1968); *Ross v. Int'l. Brotherhood of Electrical Workers,* 544 F.2d 1022, 1024 (9th Cir. 1976); *Detroy v. American Guild of*

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[1] 29 U.S.C. § 411(a)(4) provides in pertinent part:

"No labor organization shall limit the right of any member thereof to institute an action in any court, . . . *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof."

[2] Section 411(a)(4) does "not establish a jurisdictional bar or absolute waiver to judicial review, but preserves the discretionary exhaustion doctrine which allowed pre-LMRDA courts to determine whether pursuit of internal remedies should be required in a given case." *Fulton Lodge No. 2, International Association of Machinists, etc. v. Nix,* 415 F.2d 212, 216 (5th Cir. 1969), *cert. denied,* 406 U.S. 946 (1972).

Variety Artists, 286 F.2d 75, 78 (2d Cir. 1961), *cert. denied,* 366 U.S. 929 (1961). The exercise of the court's discretion to "require, or . . . not require, the exhaustion of internal union remedies prior to court intervention [depends] upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case." *NLRB v. Marine Workers, supra,* 391 U.S. at 428 (quoting from the remarks of Senator John F. Kennedy). The trial judge found exhaustion to be inappropriate, and we agree.

One of the primary purposes of the exhaustion principle is to foster union self-regulation. Consequently, exhaustion of intra-union remedies before intervention by federal courts is "most absolute where the complaints allege wrongdoing regarding internal union affairs." *Chambers v. Local Union No. 639,* 578 F.2d 375, 384 (D.C. Cir. 1978). Exhaustion is not required when the administrative remedies are inadequate. In *NLRB v. Marine Workers, supra,* 391 U.S. at 425, the Supreme Court stated:

> "There cannot be any justification to make the public processes wait until the union member exhausts internal procedures plainly inadequate to deal with all phases of the complex problem concerning employer, union, and employee member. If the member becomes exhausted, instead of the remedies, the issues of public policy are never reached and an airing of the grievance never had."

Therefore, when, as here, the plaintiffs have raised issues that are in the public domain and beyond the internal affairs of the union, the union's internal procedures may be

inadequate.[3] *Chambers, supra,* 578 F.2d at 385. "First Amendment rights are among the most fragile possessions of a citizen. Delay in deciding the First Amendment issues could not only endanger the free speech rights of plaintiff[s] but of others of similar persuasion." *Pearl v. Tarantola,* 361 F.Supp. 288, 292 (S.D.N.Y. 1973); *Semancik v. United Mine Workers of America Dist. #5,* 466 F.2d 144, 150-151 (3d Cir. 1972); *Giordani v. Upholsters'* [sic] *International Union of No. America,* 403 F.2d 85, 88 n.7 (2d Cir. 1968); *Keefe Brothers v. Teamsters Local Union No. 592,* 562 F.2d 298, 303 (4th Cir. 1977). Thus, in our opinion, the district court did not err in denying the Union's motion for summary judgment. In so doing, the court acted well within its discretion. No error was committed.[4]

Sufficiency of Evidence

The facts relating to each of the charges have been exhaustively discussed in the briefs. We do not need to repeat them here. Both parties agree that the fines could not have been imposed against the plaintiffs for returning to work once they had resigned from the Union. *NLRB v. Granite State Joint Board, Textile Workers Union,* 409 U.S. 213 (1972); *Booster Lodge No. 405, Int'l Ass'n of Machinists v. NLRB,* 412 U.S. 84 (1973). The issue presented to the

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[3]The mere assertion by a union member that his free speech rights have been infringed will not, in all cases, render the exhaustion doctrine inapplicable. It is within the sound discretion of the trial court to make this determination. Appellate review is limited to preventing an abuse of this discretion.

[4]The record also indicates that at the time the plaintiffs filed suit in the district court their intra-union appellate remedies had long since expired. There was therefore no assurance that the plaintiffs would have been able to vindicate their rights through union procedures.

court below was therefore one of determining the Union's intent and motive for disciplining the plaintiffs. There is substantial evidence in the record that in fact it was the plaintiffs' post-resignation return to work that prompted the fines. Moreover, the charges included pre-resignation conduct that was clearly within the protection of the LMRDA. We therefore find that the jury could have reasonably arrived at the conclusion that it was the Union's purpose to punish the plaintiffs for resigning and returning to work. The Union's attempt to weave the plaintiffs' conduct into an unprotected conspiracy is unavailing. "It matters not that the grounds urged by the Union to support its disciplinary action may have a semblance of lawfulness if the true motivation for the action was unlawful." *NLRB v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 470 F.2d 57, 62 (2d Cir. 1972). The evidence was sufficient to justify the jury's finding of a violation of plaintiffs' rights of freedom of speech and assembly.[5]

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[5]We are unimpressed by the Union's argument that judicial review of the intra-union proceedings is precluded since the disciplinary actions taken against the plaintiffs were supported by "some evidence" of guilt. The Union's reliance on *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233 (1971) is misplaced. Unlike the question presented in *Hardeman,* the infirmity is not in the procedure used or the method of discipline, but in the fact that the discipline is being imposed for an improper purpose. To adopt the Union's reading of *Hardeman* would have the effect of "insulat[ing] any Union discipline of a member, so long as the charges brought against him are supported by 'some evidence', no matter how insubstantial or suspicious that evidence might be." *NLRB v. Local 294, International Brotherhood of Teamsters, supra,* 470 F.2d at 62. We will not adopt such a reading.

In *Hardeman* the Supreme Court stated:

> "There remains only the question whether the evidence in the union disciplinary proceeding was sufficient to support the

Compensatory Damages

In *International Brotherhood of Boilermakers v. Rafferty,* 348 F.2d 307, 315 (9th Cir. 1965), this court held that "emotional distress, standing alone, does not constitute a sufficient basis for the awarding of damages under the [LMRDA]." The Union contends that the damages awarded the plaintiffs were for emotional distress alone, contrary to this court's holding in *Rafferty.* They argue that the evidence was insufficient to prove the existence of any injury other than emotional distress. We agree with the Union as to some of the plaintiffs and disagree as to the others.

With respect to Dan Carr, Wil Klatt, Stella Bradley, and Claude Stones, we vacate the jury's award of com-

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finding of guilt. Section 101(a)(5)(C) of the LMRDA guarantees union members a 'full and fair' disciplinary hearing, and the parties and the lower federal courts are in full agreement that this guarantee requires the charging party to provide some evidence at the disciplinary hearing to support the charges made. This is the proper standard for judicial review. We have repeatedly held that conviction on charges unsupported by any evidence is a denial of due process [citations omitted] and we feel that § 101(a)(5)(C) may fairly be said to import a similar requirement into union disciplinary proceedings." *Hardeman, supra,* at 245-246.

The Second Circuit in *NLRB v. Local 294, International Brotherhood of Teamsters, supra,* the Honorable Leonard P. Moore speaking for the Court, interpreted the above passage as follows:

> "The clear import of the language cited is not that 'some evidence' to support the charge will preclude Board or judicial review, but rather, that unless some evidence is presented by the charging party against the accused member the Union will be held to have violated the due process requirement implicit in Section 101(a)(5)(C) of the Act." 470 F.2d at 62.

We agree with Judge Moore's reading of *Hardeman. Hardeman* did not involve freedom of speech or assembly. While we must respect the congressional judgment of judicial noninterference in the internal affairs of unions, we must also not forget the special need to protect individual members against the danger of overreaching by entrenched union leadership.

pensatory damages. This court's holding in *Rafferty* simply does not allow compensatory damages for being angry, nervous, upset, or depressed. We also vacate the jury's award of compensatory damages to Lillian Ornellas for the reason that there was no proof of any actual injury. While the plaintiff did testify that she had to leave work early several times because of being upset over the Union's charges, she did not testify, nor is there any evidence in the record, that she suffered any actual injury because of leaving work early, e.g., lost wages.

The award of compensatory damages to Rebecca Bise, Victoria Pappas, Maxine Stones, and Frances Kaona stands. As to these plaintiffs there was sufficient evidence of causal connection between the Union's conduct and the actual injuries allegedly sustained by each of the plaintiffs to present a jury question. It was for the jury to believe or not believe whether the conduct of the Union caused the respective plaintiffs to suffer lost wages and sleep, headaches and heart palpitations, numbness in the feet and hands, and an increase in weight. We will not disturb its decision.

Punitive Damages

Although there is much controversy whether punitive damages are recoverable under the LMRDA, this court has adopted the view that they are. *Cooke v. Orange Belt District Council of Painters,* 529 F.2d 815, 820 (9th Cir.

1976.[6] Punitive damages are proper where the plaintiff can establish actual malice or reckless or wanton indifference to his rights. *Id.* Although we have disallowed compensatory damages as to some of the plaintiffs, we have also upheld the jury finding of a violation of the plaintiffs' section 411(a)(2) rights. All plaintiffs established their *right* to compensatory damages. Some of them failed to prove any such damages under our *Rafferty* ruling. Nevertheless, punitive damages are permissible to vindicate the invasion of those protected rights and as a deterrence against future violations by over-zealous unions and their officers. *International Brotherhood of Boilermakers, Iron Shipbuilders, etc. v. Braswell,* 388 F.2d 193, 199-201 (5th Cir. 1968). *Cf. Gill v. Manuel,* 488 F.2d 799, 802 (9th Cir. 1973) (an award of compensatory damages is not a necessary prerequisite to an award of punitive damages under 42 U.S.C. § 1983).

Accordingly, it was for the jury to determine whether the defendants acted with malice or recklessly or with wanton indifference. After careful consideration of the record, we are of the opinion that there is sufficient evidence to support the jury's award of punitive damages. It is not the function of this court to substitute its judgment for that of the jury's. Determining state of mind is a fact-

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[6]We are aware of the Supreme Court's ruling in *IBEW v. Foust,* ... U.S. ..., 60 L.Ed.2d 698 (1979), but find it inapposite here. *Foust* did not overrule or cast doubt on this court's decision in *Cooke, supra.* The majority opinion in *Foust* expressed no opinion on the propriety of punitive damages in suits under the Landrum-Griffin Act. *Foust, supra,* 60 L.Ed.2d at 704, n.9. Although the legislative history of the Landrum-Griffin Act is not all that clear (and is probably inconclusive), it may be said that the overall thrust of the Act was to protect the individual rights of union members and to deter abuse and denial thereof by union officers. The awarding of punitive damages will, in proper cases, serve this purpose.

finding task peculiarly within the jury's domain. We will therefore not disturb this finding on appeal.[7]

Attorneys' Fees

The awarding of attorneys' fees under section 102 of the LMRDA is clearly within the equitable power of federal courts. *Hall v. Cole,* 412 U.S. 1, 9 (1973); *Ross v. IBEW, supra,* 544 F.2d at 1025. Attorneys' fees are allowable when: (1) the opposing party acted in bad faith; (2) the litigation performed a valuable service for the union and its members. *Ross, supra.* The court below found both grounds to be present, and we cannot say such a finding was clearly erroneous. Therefore, the district court did not err in awarding attorneys' fees.

We also conclude that the amount of the award was appropriate. The amount of attorneys' fees awarded is within the sound discretion of the trial court. *Ross, supra.* The pertinent factors which are to be considered by the trial court in setting reasonable attorneys' fees in an LMRDA suit have been enumerated in *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67 (9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976).[8] The trial court carefully considered

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[7]The Union does not question the trial court's punitive damages instructions.

[8]These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr, supra,* 526 F.2d at 70.

each of the *Kerr* factors in determining the amount of the award. We can find no abuse of discretion.[9] The amount of the award therefore stands.

CONCLUSION

We have considered the other arguments raised by both the Union and the plaintiffs and find them to be without merit.[10] We therefore affirm on all issues with the exception of the jury's award of compensatory damages. As to the compensatory damage award we affirm in part and reverse and vacate in part as detailed above.

IT IS SO ORDERED.

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[9]This conclusion also settles the matter of the plaintiffs' cross-appeal for additional attorneys' fees.

[10]We find no merit in the plaintiffs' argument that the Union's charging letters were not specific enough to satisfy the requirements of section 101(a)(5). We believe that the charges were specific enough to inform the plaintiffs, with reasonable particularity, of the details of the alleged violations. Moreover, there is no evidence in the record to indicate that the charging letters misled or comprised the defense of any plaintiff. The plaintiffs' other arguments under section 101(a)(5) are frivolous and do not warrant discussion.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Rebecca Bise, Stella Bradley, Dan Carr, Frances Kaona, Wil Klatt, Lillian Ornellas, Victoria Pappas, Maxine Stones and Claude Stones, Plaintiffs-Appellees, vs. International Brotherhood of Electrical Workers, AFL-CIO Local 1969, Dick Cripe, Elsie M. Smith, and Does I through XXV, Defendants-Appellants.	No. 77-2386
Rebecca Bise, Stella Bradley, Dan Carr, Frances Kaona, Wil Klatt, Lillian Ornellas, Victoria Pappas, Maxine Stones and Claude Stones, Plaintiffs-Appellants, vs. International Brotherhood of Electrical Workers, AFL-CIO Local 1969, Dick Cripe, Elsie M. Smith, and Does I through XXV, Defendants-Appellees.	No. 77-2405

[Filed Dec. 19, 1979]

ORDER

Before: KILKENNY and ANDERSON, Circuit Judges, and JAMESON,* District Judge.

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix C

United States District Court
Northern District of California

Rebecca Bise, et al., Plaintiffs, vs. International Brotherhood of Electrical Workers, AFL-CIO LOCAL 1969, et al., Defendants.	No. C-75-0044 WHO

[Filed Feb. 7, 1977]

JUDGMENT ON GENERAL VERDICT ACCOMPANIED BY SPECIAL INTERROGATORIES FOR PLAINTIFFS

This cause came on to be tried before the Honorable William H. Orrick, United States District Judge, and a jury, at the United States District Court for the Northern District of California, and the Court having submitted interrogatories and the jury having answered the interrogatories and having given general verdicts and the plaintiffs, upon a ruling of the Court, having accepted remittitur;

IT IS HEREBY ORDERED that plaintiff Rebecca Bise have and recover from defendants compensatory damages in the amount of three hundred dollars ($300) and punitive damages in the amount of two thousand five hundred dollars ($2,500); plaintiff Stella Bradley have and recover from defendants compensatory damages in the amount of five hundred dollars ($500) and punitive damages in the

amount of two thousand five hundred dollars ($2,500); plaintiff Dan Carr have and recover from defendants compensatory damages in the amount of one thousand dollars ($1,000) and punitive damages in the amount of two thousand five hundred dollars ($2,500); plaintiff Frances Kaona have and recover from defendants compensatory damages in the amount of six hundred dollars ($600) and punitive damages in the amount of two thousand five hundred dollars ($2,500); plaintiff Wil Klatt have and recover from defendants compensatory damages in the amount of eight hundred dollars ($800) and punitive damages in the amount of two thousand five hundred dollars ($2,500); plaintiff Lillian Ornellas have and recover from defendants compensatory damages in the amount of eight hundred fifty dollars ($850) and punitive damages in the amount of two thousand five hundred dollars ($2,500); plaintiff Victoria Pappas have and recover from defendants compensatory damages in the amount of two hundred dollars ($200) and punitive damages in the amount of two thousand five hundred dollars ($2,500); plaintiff Claude Stones have and recover from defendants compensatory damages in the amount of one dollar ($1); plaintiff Maxine Stones have and recover from defendants compensatory damages in the amount of six hundred dollars ($600) and punitive damages in the amount of two thousand five hundred dollars ($2,500); for the total sum of twenty-four thousand eight hundred fifty-one dollars ($24,851).

IT IS FURTHER ORDERED that plaintiffs shall recover from defendants as counsel fees herein the further sum of twenty thousand dollars ($20,000).

IT IS FURTHER ORDERED that the plaintiffs, and each of them, recover from the defendants interest on the judgment and the counsel fees at the legal rate from the date of entry of judgment until paid, together with the costs of this action to be taxed by the Clerk of this Court.

IT IS FURTHER ORDERED that a permanent injunction issue out of and under the seal of this Court, directed to the defendant Local 1969 IBEW, its officers, agents, servants and employees and attorneys, and those in active concert or participating with them, and each and every one of them, barring each of them from attempting to enforce the union fines against plaintiffs by suit or any other means.

Dated: February 7, 1977.

/s/ William H. Orrick
William H. Orrick
United States District Judge

Appendix D

Law Offices of
JOSEPH E. BERGERON
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Attorney for Plaintiffs

United States District Court
for the
Northern District of California

Rebecca Bise, et al., Plaintiffs, vs. International Brotherhood of Electrical Workers, ALF-CIO Local 1969, et al., Defendants.	No. C-75-0044 WHO

[Filed Feb. 11, 1975]

ORDER PENDENTE LITE

It is the order of this court that the Defendants, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS UNION LOCAL 1969, its agents, employees, servants and attorneys, and Defendants RICHARD CRIPE and ELSIE SMITH, and their agents, employees, servants and attorneys are enjoined, restrained and prohibited from:

1. Further processing of any cases already on file in any Superior Court or Municipal Court of the State of California concerning any of the Plaintiffs in this action.

2. Filing any further cases in any Court of the State of California against any of the Plaintiffs in this action.

3. Taking any further action against any of the Plaintiffs involved in this action for any reason which is the subject of this action.

Dated: February 11, 1975

/s/ WILLIAM H. ORRICK, JR.
William H. Orrick
Judge
United States District Court

Appendix E

In the United States District Court
Northern District of California

Before: Honorable William J. Orrick, Jr., Judge

Rebecca Bise, et al., Plaintiffs, vs. International Brotherhood of Electrical Workers, AFL-CIO Local 1969, et al., Defendants.	No. C-75-0044 WHO

REPORTER'S TRANSCRIPT

Friday, January 9, 1976

Reported by: Lawrence J. White, R.P.R.

APPEARANCES:

For the Plaintiffs:

Joseph E. Bergeron, Esquire
Stephen J. Camber, Esquire
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For the Defendants:

Davis, Cowell & Bowe
By: Alan C. Davis, Esquire
351 California Street
Suite 420
San Francisco, California 94104

FRIDAY, JANUARY 9, 1976

The Court: Gentlemen, this matter has been exceedingly well briefed, as we all are aware. I have reviewed and appreciate the efforts that you went to before the magistrate to attempt to reach agreed statements of fact, but I have reviewed those and I have read the matter in brackets and, frankly, we are not much further along so far as trying the case on a stipulation of facts than we were several weeks or months ago.

Perhaps it was my error in thinking that the case could be settled, or at least tried, on an agreed statement of facts. So I am making this ruling.

First, with respect to the exhaustion of remedies in Section 101(a)4 which requires union members to exhaust internal union remedies before seeking recourse to the courts, unless the member can demonstrate that such remedies are futile and inadequate or uncertain, it is clear that the determination of whether to require the exhaustion of intra-union remedies is left to the discretion of the trial court, and I rely on Buzzard against Local Lodge 1040, a Ninth Circuit case, 480 F. 2d 35.

I am of the opinion in this case that insistence on the requirement of exhaustion is inappropriate. In the first place, the time limits within which the plaintiffs could have pursued their intra-union appellate remedies has long since expired. Therefore, there is no assurance that the plaintiffs will be able to vindicate their rights through intra-union procedures or that deference to the union will assist the Court in resolving the issues before it.

Moreover, whereas here the plaintiffs contend that they were disciplined for the exercise of their rights of free speech and assembly, and that such discipline was imposed in violation of due process rights, I am following Judge Duffey's statement in Pearl against Tarantola, 361 F. 2d 288 that in such a situation it is best for the Court to step in quickly. Therefore, I feel that the exhaustion of intra-union remedies is unnecessary in this case.

Now, insofar as the adequacy of the notice goes, the Landrum-Griffin Act contains due process provisions which were created as a safeguard against improper disciplinary action, and again Section 101(a)5 of the Act sets forth those safeguards.

The requirement that a union member subject to discipline be served with written specific charges has been interpreted by the Supreme Court to require charges, and I now quote it:

> "Specific enough to inform the accused member of the offense that he allegedly committed."

That is a quote from Boilermakers against Hardeman, 401 US 233.

Now, while unions need not comply with the strict notice requirements of criminal proceedings, the charges must be drafted as to inform a member with reasonable particularity of the details of the alleged offense.

I rely there on Eisman against Baltimore Regional Joint Board, 352 F. Supp. 429.

The requisite degree of specificity varies from case to case. However, circumstances surrounding an alleged dis-

ciplinary infraction by a union member, the time and place of the alleged violation and the union rules alleged to have been breeched [sic] constitute the minimum information that a union should disclose to the accused in order to afford him a reasonable opportunity to prepare his defense.

That is the holding in Gleason against Chain Service Restaurant, 300 F. Supp. 1241.

In Boilermakers, the notice of the charges found to satisfy the requirements of Section 101(a)5 contained a detailed statement of the facts relating to the basis of the disciplinary action.

Undisputably, the plaintiffs here were sent written notices informing them of the disciplinary proceedings. However, the plaintiffs maintain that charging allegations were not specific enough to satisfy Section 101(a)5 and that they were prejudiced in the presentation of their defenses by the fact that none of them knew what they were being charged with.

Well, I absolutely disagree. All the charges herein made mention of the time and place of the alleged violations. Each charge enumerated certain behavior and listed the union constitutional violations with which each plaintiff was charged.

There was no indication in the record that the alleged lack of specificity in the charging letters mislead or compromised the defense of any plaintiff. I, therefore, find that the notices of the specific charges comports with the specificity requirements of Section 101(a)5.

Plaintiffs' other claims relating to alleged due process violations are also without merit. Plaintiffs contend that

an alleged lack of a union trial board quorum at the trial of two plaintiffs, Claude Stone and Stella Bradley, and a delay of more than 45 days from the filing of the charges to the trial of Bradley constitute a denial of due process under the LRMDA.

In the first place, the affidavits on file indicate that the trial boards were duly constituted and that the trial of Bradley was held within 45 days of the time the charges against her were read at a union membership reading.

Under union procedures, such a trial is timely. Moreover, I am not convinced that such alleged procedural irregularities, even if they are proved, rise to the level of a due process violation under Section 101(a)5.

Plaintiffs' final contention in this regard is that the members' due process rights were violated since they were disciplined for an offense not specifically proscribed by the union constitution, and the plaintiffs rely on Simmons against Avisco Local 1713, 350 F. 2d 1012.

In that case the court held that a union member could not be disciplined for the offense of non-cooperation when such an offense was not included in a union constitution and bylaws.

However, Simmons has been severely undercut, if not directly overruled, by the Supreme Court in the Boilermakers case, which held that Section 101(a)5 was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members.

Thus, as the court noted, a union may discipline its members for offenses not specifically proscribed by the union's written rules.

Therefore, under Boilermakers, the plaintiffs' due process arguments fail.

Now, this leaves the specific—the factual disputes as to the conduct which the plaintiffs engaged in and for which they were disciplined.

As I indicated previously, I had hoped that the parties would have been able to work out a stipulated set of facts. I also hoped that the parties could settle this dispute amicably, but, regretably, this is not the case.

Accordingly, it is necessary to set this case for trial on the issue of whether the plaintiffs were punished for exercising rights protected by Section 101(a) of the LRMDA and, also, there are the issues in the pending state claim.

So gentlemen, when will you be able to go to trial?

Mr. Bergeron: I would like to consult my calendar.

The Court: Mr. Davis?

Mr. Davis: May I address the Court with respect to this, Your Honor?

The Court: Yes.

Mr. Davis: I would like to consult with my client with respect to this, Your Honor. I feel very sincerely and very deeply that the Court may have erred with respect to the exhaustion of remedies ruling you made.

I am inclined to recommend now that, with respect to that ruling, we find out whether it is a correct ruling prior to trying the case.

I think it would be in the Court's interest to do that. I think it would be in the interests of having a single trial, if there has to be a trial.

The Court: You mean certify this for an interlocutory appeal?

Mr. Davis: Yes, Your Honor. I think if you are in error with respect to that particular ruling, I do think that eventually there may need to be a trial with respect to that and a factual determination as well.

The Court: Mr. Bergeron?

Mr. Bergeron: Your Honor, I would like time to consider his proposal before we set it for trial or decide what, if anything, I want to do in terms of what Mr. Davis' intended action is.

The Court: I'm anxious to dispose of it. The purpose of having a matter determined by an interlocutory appeal is to save the time of the trial court. This case would take about two days to try in its present posture. So I deny the motion to certify and I am going to set the case for trial on Monday, March 1st, on the issues which I have just delineated in my opinion, unless counsel have a conflict in their calendars.

Mr. Bergeron: Your Honor, we have nine separate plaintiffs. I can't help but think it may take longer than two days.

The Court: It may. In any event, taking an interlocutory appeal to the circuit will only delay this thing about seven to eight months.

Mr. Bergeron: Could that be Monday, March 8th, or the following Monday, as opposed to the 1st?

The Court: Not the 8th. The 15th.

Is that all right with you, Mr. Davis?

Mr. Davis: March 15th?

The Court: Yes.

Mr. Davis: I believe it is, Your Honor. I don't have my calendar with me. I will make adjustments in my calendar with respect to that.

The Court: Very good. The case is set for trial Monday, March 15th.

We will have another pretrial, which will tailor the documents to these issues.

The Clerk: March 4th, Your Honor.

The Court: On March 4th at 9:00 o'clock. Hopefully, everybody can reconsider and settle this.

Mr. Bergeron: Will there be an order?

The Court: Pardon?

Mr. Bergeron: Will there be an order based on your ruling today? I did not get down everything I wanted to get down.

The Court: Well, I may file a short opinion.

Mr. Bergeron: Particularly, refining the issues.

The Court: Yes. Thank you, gentlemen.

(Whereupon, the hearing was concluded.)

Appendix F

In the United States District Court
for the Northern District of California

Before the Honorable William H. Orrick

Rebecca Bise, et al., Plaintiffs, vs. International Brotherhood of Electrical Workers, A.F.L.-C.I.O. Local 1969, et al., Defendants.	No. C-75-0044 WHO

REPORTER'S TRANSCRIPT

March 12, 1976

Reporter: Raymond Linkerman, C.S.R.

APPEARANCES:

For the Plaintiffs:

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For the Defendants:

Davis, Cowell & Bowe
Attorneys at Law
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San Francisco, CA 94104
By: John H. Cohenour, Esquire

FRIDAY, MARCH 12, 1976

The Clerk: Civil 75-0044, Bise vs. International Brotherhood of Electrical Workers, et al. Defendants' motion for partial summary judgment.

Mr. Bergeron: Ready, Your Honor. Joseph Bergeron for plaintiffs.

Mr. Camber: Stephen Camber for the plaintiffs.

Mr. Cohenour: John H. Cohenour, Davis, Cowell & Bowe, appearing for Mr. Davis.

The Court: All right, Mr. Cohenour, it's your motion, so you other gentlemen be seated.

Mr. Cohenour: Your Honor, I don't know how much we can really add here today in the way of an oral statement. There's been, as you well know, extensive briefs filed on—

The Court: Yes, I've read the numerous briefs that have been filed in the case. I don't—suppose the plaintiffs are able to prove that these charges were made against them in bad faith, wouldn't they—why wouldn't they then be entitled to damages, assuming they could prove this emotional distress?

Mr. Cohenour: Referring to the emotional distress count, Your Honor?

The Court: Yes.

Mr. Cohenour: I can only state that as far as that's concerned, I believe that in order to establish that sort of a count under California law that the conduct complained

of by the plaintiffs as to the defendants would have to be shown to be outrageous conduct and—

The Court: Right. Now, that's a matter of proof, isn't it?

Mr. Cohenour: Well, I believe that in the context of this case and the setting that we find ourselves in, internal union discipline measures, for what the union considered to be conduct which was subject to discipline under their own international constitution and bylaws, that if you get into an area where you find that to allow the plaintiffs to pursue the matter of outrageous conduct, in light of the right of the union to discipline its members for conduct—

The Court: Well, now, wait a minute, this is what we're going to be trying on Monday. We're going to be trying the question as to whether or not there was a violation of the so-called laborer's bill of rights.

Mr. Cohenour: Right.

The Court: And the facts to be adduced at that trial are going to be with reference to whether or not the plaintiff resigned from the union and then crossed the picket line and the circumstances surrounding that. Now, on that issue, if—assuming everything against the union, that the plaintiffs did resign beforehand, and they did cross the picket line, and that when they rejoined the union the union officials, in bad faith, that's a hard thing to prove, granted, but in bad faith brought these charges, why wouldn't then, if the plaintiffs—and did this in a manner that a reasonable man would say was outrageous, why then wouldn't they be able to recover for the emotional distress?

Mr. Cohenour: Well, your Honor, my own feeling on this is that in this context, of this kind of a case, that—

The Court: Well, that's the second and third time you've said that. What I want is an answer to my hypothetical.

Mr. Cohenour: I believe that would have a chilling effect on the right of the union to discipline its members, if you go to the point of finding that a plaintiff can allege outrageous conduct by a union official and a union for pursuing discipline against that member which is procedurally correct—

The Court: You think the union has the immunity that a prosecutor has? Is that the position you take?

Mr. Cohenour: No, I wouldn't go that far, your Honor.

The Court: Well, how much immunity? Can you give me—can you think of a hypothetical situation where the union—where the plaintiff could get damages for emotional distress, in the light of a strike? Is there any possibly [sic] situation you can think of?

Mr. Cohenour: In terms of discipline, in terms of the union pursuing discipline against its members for crossing a picket line during a strike, is what we're talking about, right? I mean, this is the context we're talking about? I would be hard-pressed to imagine a situation like that, your Honor.

The Court: All right. Mr. Bergeron, I'll hear from your [sic].

Mr. Cohenour: Excuse me, your Honor, your question went to the second matter, which was the emotional distress. Did you wish any other—

The Court: No, I don't have any problem—

Mr. Cohenour: —On the other issue?

Mr. Bergeron: Your Honor, I believe that we have an opportunity to prove that their conduct was outrageous and that we are entitled to damages pursuant to that conduct. There's definitely a bill of rights which provides for union members to meet, to do things, to discuss, and which we believe these union members did, and the union cannot charge them, but we believe they did charge them, for this specifically-protected conduct.

The Court: He says that the union—that your—this is sort of interfering with the union's internal disciplinary procedures.

Mr. Bergeron: No, sir, your Honor, it's not, in that the union could not proscribe and could not punish for certain conduct, and that is the conduct which they in fact did attempt to proscribe and in fact did punish. The fact that our union members met, discussed, talked about other avenues that they could pursue, ultimately resigned, which they are perfectly within their rights to do, and returned to work, they were punished for all this, which is clearly protected by the LMRDA.

Now, on the other hand, we claim that the union acted maliciously, being candid, the union didn't want anybody else doing what our plaintiffs did, because they wanted to keep everybody in line under their thumb. The best way for them to do that was to crush these people as soon as they began to exercise their rights, and they did that. Not so much to punish these people, although that was certainly

an aspect of it, but rather to set by example for everyone else that if you want to resign—if you want to exercise—in essence what they're saying is if you want to exercise your rights, you're going to have to mess with us, because we're going to punish you for exercising those rights, and that's a chilling——

The Court: Mr. Bergeron, in your fraud count, what reliance—how can you claim that your people relied, so that they would come under this torted procedure? They said throughout that they felt that they were doing this all right. They weren't relying on any union conduct.

Mr. Bergeron: Your Honor, when the complaint was initially filed, we attempted to allege, without knowing the complete set of facts, as many causes of action as we felt would be appropriate. Quite candidly, the fraud cause of action we believe is not one that can be sustained, and we concur in the motion to dismiss that one.

The Court: All right. Now, in—on this libel count, have you read the——

Mr. Bergeron: Your Honor, if I may address—if I may interrupt?

The Court: Sure.

Mr. Bergeron: Again, before we knew a lot more about this law, we saw what we thought was libel, per se. However, after having interpreted the cases, we realized that a union member can say anything about a union and a union can say anything about a union member. That means anything. So that—that cause of action, your Honor, we would also concur in not proceeding in.

The Court: All right. I grant the defendants' motion for summary judgment on Count No. 2. I deny the defendants' motion for summary judgment on Count No. 3. And I grant the defendants' motion for summary judgment on Count No. 4 for defamation.

Now, Mr.—what is your name, Mr. Coldwell?

Mr. Cohenour: Cohenour, your Honor.

The Court: How do you spell it?

Mr. Cohenour: C-O-H-E-N-O-U-R.

The Court: All right, Mr. Cohenour, I take it you're going to try the case?

Mr. Cohenour: No, your Honor, Mr. Davis will be here Monday.

The Court: All right. Well, I want you to listen—I'm sorry he isn't here.

Mr. Cohenour: I'm going to see him tomorrow, your Honor.

The Court: All right—very carefully and transmit—you prepare the order—transmit my suggestion to him, my order: Number one, I want him here at nine o'clock on Monday morning. Number two, what we're trying here is a bill of rights case. We're not trying a question as to whether or not the union—union's procedures were proper, or anything like that, and I want to get that out of the way as we—by motions in Limine, if he wishes to make a record on it, and do that first off, or as soon as I can get to it.

I will pick the jury, there will be opening arguments, and the plaintiff will put on its witnesses until twelve-thirty. Monday afternoon I have another hearing which commences at one-thirty, and we will take it up again. I want him here again Tuesday morning at nine o'clock. Clear?

Mr. Cohenour: Understood.

The Court: All right.

Mr. Bergeron: Your Honor, excuse me, may I inquire, I'm aware that the court will be going over the jury instructions this weekend and voir dire and other matters, and I have three additional simple questions concerning voir dire about a particularly sensitive item concerning one of the plaintiffs that involves a gender change.

The Court: All right.

Mr. Bergeron: I wonder if the court would consider that?

The Court: I'll take them——

Mr. Bergeron: And I have——

The Court: I think it's fair to tell you that I've looked at the voir dire, and I don't—I just don't argue the entire case—

Mr. Bergeron: Yes, sir, I appreciate——

The Court: To the jury. I cut that way, way back.

Mr. Bergeron: Yes, sir. We also have some corrections to depositions, which I'd like to file with the court and to give a copy to defendants. And an additional jury in-

struction concerning damages under the LMRDA claim, and if I may submit that to the court also.

The Court: All right.

Mr. Bergeron: Thank you, your Honor.

The Court: All right.

Mr. Bergeron: Your Honor, assuming this case isn't over in two days, you have matters set for Friday afternoon, would you continue those or would you take Friday afternoon——

The Court: No. We'll go pretty hard, Mr. Bergeron. If it looks like we can't get through, if I figure that by Tuesday, we'll be working late Wednesday and late Thursday. I want to get through.

Mr. Bergeron: Your Honor, may I ask one other matter? Mary Faulkner, who was a—the recording secretary of the union is no longer employed there. We have attempted to serve her. We don't [know] where she lives. We have a marshal now trying to find her. I wonder if counsel would endeavor to have her present?

The Court: Well, ask him.

Mr. Bergeron: Would you——

The Court: But I don't want to take up court time. I have another case here now.

Appendix G

In the United States District Court
for the Northern District of California

Rebecca Bise, et al., Plaintiffs, vs. International Brotherhood of Electrical Workers AFL-CIO Local 1969, et al., Defendants.	No. C-75-0044 WHO

REPORTER'S TRANSCRIPT

June 23, 1976

APPEARANCES:

Before: Honorable William H. Orrick, Judge

For Plaintiffs:

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For Defendants:

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351 California Street
San Francisco, CA 94104

By: Alan C. Davis, Esq.

JUNE 23, 1976

The Clerk: Civil 75-0044, Bise, et al. Versus International Brotherhood of Electrical Workers, et al.; post trial motions.

Mr. Camber: Stephen Camber for the plaintiffs.

Mr. Bergeron: Good afternoon, Your Honor, Joseph Bergeron.

The Court: Mr. Camber, Mr. Bergeron.

Mr. Davis: Good afternoon, Your Honor, Alan C. Davis on behalf of the defendants.

The Court: Mr. Davis.

As usual, gentlemen, you filed extensive briefs and very good briefs and I have read them and is there anything in particular you want to say, Mr. Davis?

Mr. Davis: No, I don't think so, Your Honor. I just wanted to point out that I thought the subject had been adequately briefed and I was here to respond to any questions you might have in this regard.

The Court: All right; Mr. Bergeron?

Mr. Bergeron: No, Your Honor. I would address myself to any questions the Court felt needed explaining. Thank you.

The Court: All right. I deny the defendants' motion for judgment NOV. However, I am entering an order of remititer [sic] of the judgment from $84,851 to $24,651 and if plaintiff fails to accept that, of course I have to order a new trial. And I am doing that on the grounds that, in my

view, the punitive damages were excessive and not supported by the evidence. The punitive of $10,000 each, I think, came from an almost impassioned jury and so I cut the punitives to $2500 each and that brings the total down. And the plaintiff will, if it accepts the remititer [sic] prepare a form of judgment consistent with the remititer [sic].

Are you able to say at this time, Mr. Bergeron, what you want to do about that?

Mr. Bergeron: Your Honor, if I can clear up a point, perhaps. The Court indicated that you reduced the punitive to $2500 or by——

The Court: $2500 each instead of $10,000 each.

Mr. Bergeron: Oh, thank you.

Your Honor, I would, of course, have to discuss that with my clients as to that extent.

The Court: Yes. All right. Well, then I was of the view that $2500 is the figure that a proper functioning jury should have found.

I'll defer judgment with respect to the award of attorney fees until the next hearing which will be July 14th. If you will come to court on that date, Mr. Bergeron and Mr. Davis, we'll wind up this matter.

Mr. Davis: May I have just a moment, Your Honor?

The Court: Yes.

Mr. Davis: Your Honor, we're available on the 14th.

May I address the Court on one point?

The Court: Yes.

Mr. Davis: On the subject of attorneys fees, I believe you are aware of our memorandum dealing with the subject in which we request a hearing on the subject of attorneys fees and additional discovery. I think it might be worthwhile to take some of the discovery out of the presence of the Court, but we can do it either way, at this Court's discretion, asking questions, pursue subjects of the memorandum in open court or through further discovery proceedings. I think it might be wise to do this in discovery, however.

The Court: Well, I'll deal with that July the 14th.

Mr. Davis: On July 14th? Thank you.

Mr. Bergeron: Your Honor, could I—I'm not sure what to be prepared for on July 14th with respect to the attorneys fees. If the Court could, I am—is the certificate of counsel Mr. Camber and I have submitted sufficient or is the Court——

The Court: Well, I haven't reviewed it in that detail Mr. Bergeron, but I'll listen to argument with respect to the points made in Mr. Davis' brief in that time. And you can submit any other papers you want on that point.

Mr. Bergeron: All right. We are not to prepare judgment until we——

The Court: No, I'll also want to hear, on the 14th, what your—whether you are going to want a new trial.

Mr. Bergeron: And is that at 1:30, Your Honor?

The Court: Yes, 1:30.

Mr. Bergeron: Thank you, Your Honor.

Appendix H

United States District Court
Northern District of California

Rebecca Bise, et al., Plaintiffs, vs. International Brotherhood of Electrical Workers, AFL-CIO Local 1969, et al., Defendants.	No. C-75-0044 WHO

[Filed Feb. 7, 1977]

OPINION

With respect to plaintiffs' request for the award of attorneys' fees, the Court determines as follows:

This action was brought by nine members of the defendant union, the International Brotherhood of Electrical Workers, Local 1969, under provisions of the Labor Management Reporting and Disclosure Act (LMRDA or the Act), 29 USC § 411 et seq, seeking injunctive relief and damages for the allegedly wrongful discipline imposed on them by the union.

Plaintiffs were union members and employees of Precision Plastics, Inc. of South San Francisco, California, when Local 1969 commenced a sanctioned strike against Precision during the summer of 1974. Plaintiffs were not in accord with the strike and various of them resigned from membership in the union and returned to work during the course of the strike. After settlement of the strike in August 1974, plaintiffs rejoined the union, paying a $40 initiation fee.

In September 1974, Local 1969 charged plaintiffs with violations of a number of provisions of the IBEW Constitution, conducted hearings, and found each plaintiff guilty of certain charges, imposing fines ranging from $250 to $1250. The charges included unauthorized crossing of picket lines prior to resignation from the union, working in concert with the struck employer, and engaging in activity to undermine the local as the collective bargaining representative of Precision's employees. Several of the plaintiffs were not present at the hearings at which the fines against them were imposed.

Plaintiffs did not pursue the union's internal appeals process by filing an appeal within a thirty day time period. In a prior order entered in this proceeding, the Court found that exhaustion of intraunion remedies was unnecessary under the circumstances. Nor have plaintiffs paid the fines imposed, although the union constitution allows payment at a rate of $20 per month under protest while appealing or seeking other remedies.

The union filed suit for the collection of the fines from one plaintiff in state court. Thereupon, plaintiffs brought this suit, seeking to enjoin the enforcement and collection of the fines, alleging that the behavior for which they had been disciplined was protected under Section 101(a)(2) of the Act (29 USC § 411(a)(2) and that the fines were imposed in violation of the due process requirements of Section 101(a)(5) of the Act (29 USC § 411(a)(5)).

The cause was heard by a jury, which answered special interrogatories submitted by the Court and rendered a general verdict in favor of plaintiffs. Thereafter, the

Court reduced the amount of punitive damages awarded to each plaintiff, and plaintiffs accepted remittitur.

The remaining issue in this case concerns plaintiffs' motion for an award of attorney's fees. According to the "American rule", a prevailing litigant may not ordinarily collect a reasonable attorneys' fee from the loser in the absence of statutory authorization of contract. *See Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975); *Hall v. Cole,* 412 U.S. 1, 4 (1973). Nevertheless, the Supreme Court has recognized certain exceptions by which federal courts have been allowed in their discretion to award such fees. In the context of an LMRDA suit, the Court articulated two possible grounds: that the opposing party acted in bad faith; or that the litigation conferred a substantial benefit on the union and its members *Hall, supra; see Ross v. International Brotherhood of Electrical Workers,* No. 74-3148 (9th Cir., Oct. 22, 1976). As this circuit has recently noted, the Supreme Court's decision in *Alyeska, supra,* eliminating the "private attorney general" exception to the American rule, does not overrule *Hall. Ross, supra,* slip opinion at 4-5.

While the existence of either of the two grounds mentioned in *Hall* would permit an award (*Ross, supra,* slip opinion at 4), both are present here. Bad faith was demonstrated not in the conduct of the lawsuit, but rather in the actions which made it necessary. *Cf. Hall v. Cole, supra,* 412 U.S. at 15. Moreover, by bringing the suit, plaintiffs have benefited union members by inhibiting future union attempts to use arbitrary procedures to restrict the expression of First Amendment rights. *Cf. Ross, supra,* slip

opinion at 4. The Court finds unconvincing the union's efforts to establish that the award should be barred by further equitable considerations, including alleged employer financing of the suit and failure to exhaust intra-union remedies. As to the latter contention, see *Ross, supra,* slip opinion at 3.

Having determined that an award of attorneys' fees is warranted in the present case, the Court must calculate the appropriate amount. The proper factors to consider when setting attorneys' fees in an LMRDA suit have been enumerated in a recent decision of this Circuit, *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67 (9th Cir. 1975), *cert. denied* 96 S.Ct. 1726 (1976). The Court in *Kerr* adopted the factors originally set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), a Title VII suit.

Those factors are:

> "• • • (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases." *Kerr, supra,* 526 F.2d at 70.

Carefully considering the requests and affidavits which plaintiffs have presented in connection with their motion in light of these factors, and concluding that defendant raises no substantial factual disputes with regard to this information, the Court finds that an award of $20,000 is appropriate.

Specifically, the Court considered the following data relevant to the *Kerr* factors:

(1) *Time and labor required*: Plaintiffs' attorneys Bergeron and Camber submitted a detailed record of time spent in the preparation and trial of the action, including time spent in discovery (further divided into time expended on interrogatories, depositions and record examination); client conferences; filings with the court; court appearances; trial preparation; trial; post trial; and "miscellaneous" (research and memoranda addressed to issues which the attorneys felt defendants might raise but which were not in fact raised). Accompanying each category except "miscellaneous" (for which only 8 hours were billed) is a list describing in more detail the activities for which fees are charged.

The attorneys concede that they did not keep contemporaneous time slips on every hour expended. Instead, they have partially reconstructed the time spent, relying on, *inter alia,* examination of their calendars, documents filed in the case, and previous billings, as well as the existing time slips. While this method is less desirable than reference to a complete set of time slips, and while mere estimates are unacceptable, reconstruction as thorough as that undertaken in this case is permissible. *See Lindy Bros.*

Bldrs., Inc. of Phila. v. American R & S San. Co., 382 F. Supp. 999 (ED. Pa. 1974).[1]

The Court finds that the total number of hours listed is stated with the requisite accuracy. The Court notes, however, that both attorneys frequently appeared in court when one would have sufficed.

(2) and (3) *Novelty and difficulty of the questions and skill requisite to perform the legal service properly:* The Court notes that counsel for both plaintiff and defendant acknowledged that the issues with which they grappled were complex and that the area of law involved was unsettled. Moreover, the Court recognizes the diligence and skill with which attorneys for both parties conducted the litigation.

(4) *Preclusion of other employment:* Plaintiffs' attorneys had little experience in the area of labor law; thus the present litigation did not pose conflict of interest problems which precluded their acceptance of otherwise available business. Nevertheless, the protracted nature of the suit taxed both attorneys' energies over a substantial span of time. While this bitterly-contested lawsuit no doubt re-

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[1]The court in *Lindy Bros.* suggested that attorneys seeking fees in the future, cognizant of the primary importance of the time factor in determining the amount due, "should keep complete and accurate time records." 382 F.Supp. at 1011. Nonetheless, the court did find the reconstructions sufficient to allow an award. While the Court here agrees that reconstruction, if diligently undertaken, can furnish information sufficient for an award, it should be emphasized that contemporaneous time records are preferable. First, the attorney who fails to keep such records must risk that the court will deem his or her efforts at reconstruction to be inadequate. Second, the prudent attorney, recognizing that a reconstruction cannot reasonably be expected to be flawless, will (and should) generally find it necessary, as plaintiffs' attorneys assert they did here, to *under-estimate* the number of hours spent.

duced the likelihood that Bergeron or Camber would be retained by unions or ardent union members in the future, their previous lack of involvement in this field suggests that preclusion of this particular type of employment would not pose severe problems for them.

(5) *Customary fee:* The amount of attorneys' fees awarded herein is compatible with the customary fees charged in the community for similar work.

(6) *Nature of the Fee Arrangement (Whether the Fee Is Fixed or Contingent):* The parties originally arranged for the payment of a fixed hourly fee, but later decided to change to a contingent fee agreement, with plaintiffs remaining obligated to pay costs and past fees. While the agreement is rather complex, it provides basically for a return to plaintiffs of amounts paid if a certain amount was received in fees.

(7) *Time limitations:* There is no showing that the work involved took priority over other legal work simultaneously undertaken by Bergeron and Camber. The attorneys themselves concede that this factor is not pertinent.

(8) *Amount involved and results obtained:* Plaintiffs are awarded the substantial sum of $84,851. In addition, they are relieved of union fines totaling $6,350 as a result of their attorneys' efforts. Moreover, the disposition of the case helped to secure the First Amendment rights of all union members at the plant.

(9) *Experience, reputation, and ability of the attorneys:* While neither attorney was experienced *in the field,* both demonstrated substantial skill in the course of this litigation. It should be taken into consideration, however, that

Bergeron was considerably more experienced than Camber. While a recent admittee who demonstrates skill should not be penalized for his inexperience (*Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974), it is also true that fee scales generally do reflect an "experience differential." *Id.* at 718-19. *See Lindy Bros. Bldrs., Inc. of Phila. v. American R & S San. C.*, 382 F.Supp. 999, 1005 (ED Pa. 1974).[2]

(10) *Undesirability of the case:* The undesirability here stems principally from the fact that plaintiffs' stance was disfavored both by the union and by many of its members. The representation of a dissident minority in its efforts to assert its constitutional rights is surely a worthy undertaking; at the same time, it is one which is likely to subject the attorneys involved to a certain degree of unpopularity in substantial segments of the community.

(11) *Nature and length of the relationship:* Since the relationship between plaintiffs' attorneys and their clients arose wholly from the present litigation, the fee agreed upon did not reflect any special arrangement which might be agreed upon in the case of an established client.

(12) *Awards in similar cases:* While there is not an abundance of data concerning this element, the available information indicates that the fees awarded here are compatible with awards in similar cases. *See, e.g., Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975).

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[2]The Court finds without merit defendants' assertion that the time spent by the attorneys in "factual investigation" should be billed at a lower rate than other legal work. Such work is not the type of non-legal investigation referred to by the court in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974).

Plaintiffs' attorneys specified fees charged for the various types of legal work involved in the suit. They noted $50 per hour for non-court time; $250 per court appearance; $400 for one-half day of trial; and $750 for a full day of trial. Based on these rates, they ask for an award of almost $40,000.

The award of a substantially lower sum is based on a careful weighing of the factors above. Among the facts indicating that a reduction would be appropriate are the following: that two attorneys appeared in court when one would have sufficed; that the suit neither posed severe conflict of interest problems during its pendency nor seriously limited the lawyers' possibilities for future employment; that Camber was considerably less experienced than Bergeron; and that the amount awarded appears to conform more closely with awards in similar cases.

Appendix I

BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

29 USC

§ 411. Bill of rights

• • • •

(a)(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

• • • •

(4) Protection of the right to sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding,

or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Effect of constitution and bylaws. Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.
(Sept. 14, 1959, P. L. 86-257, Title I, § 101, 73 Stat. 522.)

§ 412. Civil enforcement

Any person whose rights secured by the provisions of this title [29 USCS §§ 411-415] have been infringed by any violation of this title [29 USCS §§ 411-415 of this title] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization

shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.
(Sept. 14, 1959, P. L. 86-257, Title I, § 102, 73 Stat. 523.)

§ 529. Prohibition on certain discipline by labor organization

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 [29 USCS § 412] shall be applicable in the enforcement of this section.
(Sept. 14, 1959, P. L. 86-257, Title VI, § 609, 73 Stat. 541.)

§ 530. Deprivation of rights under Act by violence

It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.
(Sept. 14, 1959, P. L. 86-257, Title VI, § 610, 73 Stat. 541.)

§ 157. Rights of employees

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collec-

tively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 USCS § 158(a)(3)].
(July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101 in part, 61 Stat. 140.)

29 USC § 158(b)(1) and (2)

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

APPENDIX J

DEFENDANTS EXHIBIT NO. 1,001
TRIAL BOARD HEARING

August 29, 1974

Roll call of officers resulted as follows:

John Knezevich	President
Mary F. Faulkner	Recording Secretary
John Thomas	Treasurer
Tony Laurio	Board Member
Noreen Zanoni	Board Member
Dorothy Ackerman	Board Member (absent)
Joe Berghone	Board Member (vacation)

Trial Board called to order at 1:00 P.M.

The accused were as follows: David Ballastrasse, Forrest E. Barnes, Claude Stones all from Precision Plastics Mfg. Company, 340 Roebling Road, South San Francisco, California 94080.

Mr. Ballastrasse was contacted by letter and telephone at time of trial but chose not to appear because time was not convenient for him. President John Knezevich tried to accommodate him on time but was unable to.

Mr. Barnes was contacted by telephone and by mail but chose not to appear.

Mr. Stones was contacted by mail but chose not to appear.

All were contacted in accordance with Article XXVII, Section 4, of the I.B.E.W. International Constitution, the trial proceeded as scheduled.

The Trial Board was properly constituted in accordance with Article XXVII, Section 5 and 7 of the I.B.E.W. International Constitution. President John Knezevich acting as chairman read the charges of each. Business Representative, Elsie M. Smith, the charging party in all three cases made her opening statement to the Trial Board, then presented each case individually. All three were charged with violating Article XXVII, Section 1, subsection 3, 6, 9 and 10 of the I.B.E.W. International Constitution.

David Ballestrasse, 306 Richmond #5, Millbrae, Ca. 94030, was offered a Foremans [sic] job in order for him to work during the strike. He began working July 15, 1974 and there after until the end of the strike August 16, 1974.

Mr. Ballestrasse requested a withdrawal from the union by telegram on July 13, 1974 and was observed going thru picket lines. Mr. Ballestrasse joined the union December 12, 1971.

Discussion by Trial Board was as follows: It was a unanimous decision of the Trial Boards [sic] decision that David Ballestrasse was guilty of violating Article XXVII, Section 1, Subsection 3 and not guilty of Article XXVII, Section 1, Subsection 6, 9 and 10. The penalty an assessment of Five Hundred ($500.00) dollars, with a suspended sentence of Four Hundred Fifty ($450.00) due to it being a first offense.

Claude Stones, Foreman at Precision Plastics withdrew from the union in order to work during the Precision strike. He requested a Withdrawal by letter July 13, 1974, received in the office July 15, 1974. He crossed the picket line every day, transported another member, his wife, who also resigned from the union.

Claude Stones constantly causes dissention among the members at work, by criticizing the union, and is still causing this problem. He crossed the picket line and worked from July 15 thru August 16, 1974. He joined the union with 892 in October of 57.

Discussion by Trial Board: It was a unanimous decision of the Trial Board that Claude Stones is guilty of violating Article XXVII, Section 1, Subsection 3, 6, 9 and 10. The penalty, an assessment of Fifteen Hundred ($1,500.00) dollars with a suspension of Two Hundred Fifty ($250.00) due to it being a first offense.

Forrest E. Barnes, maintenance man, retired but retained by the Company as part time worker, was called in to work periodically on Company assignments during the strike. He is retired but must retain membership to work at Precision. He was seen five or six times going into the plant to work, applied for Withdrawal on August 8, 1974, joined the union in 68.

Discussion by Trial Board was as follows: It was unanimous decision of the Trial Board that Forrest Barnes was guilty of violating Article XXVII, Section 1, Subsection 3 and 10 and not guilty of Article XXVII, Section 1, Subsection 6 and 9, the penalty, an assessment of Two Hundred Fifty ($250.00) with a suspension of Two Hundred ($200.00) being a first offense.

The Trial Board decision was sent to the above members, meeting adjourned at 5:05 P.M.

Respectfully submitted

Mary J. Faulkner
Recording Secretary

DEFENDANTS EXHIBIT NO. 1,002

TRIAL BOARD HEARING

October 9, 1974

The meeting was called to order at 7:00 P.M. by President John Knezevich. Roll Call of Officers as follows:

President	John Knezevich
Vice President	Ada Clanton
Treasurer	John Thomas
Ex. Board Member	Wayne Buenger
Ex. Board Member	Joe Berghone
Ex. Board Member	Tony Laurio
Ex. Board Member	Dorothy Ackerman
Ex. Board Member	Noreen Zanoni
Recording Secretary	Mary Faulkner

In accordance with the IBEW Constitution, Article XXVII, Section 11, this is a properly constituted Trial Board.

Charges have been preferred by Brother Richard (Dick) Cripe, Assistant Business Manager of the IBEW Local No. 1969, against the following members employed at Precision Plastics, Mfg. Company, at 340 Roebling Road, South San Francisco, California 94080.

All were notified in accordance with Article XXVII, Section 4 of the IBEW Constitution.

Local No. 1969 of the IBEW was on a sanctioned strike against Precision Plastics, Mfg. Company from July 15, 1974 to August 19, 1974.

First Called: Sister Victoria Pappas—

Victoria was charged with violating Article XXVII, Section 1, Subsection 3, 4, 10 and 21 of the IBEW International Constitution.

The charges were read in her presence by President John Knezevich. President Knezevich asked her how she pleaded, her response was not guilty of all charges.

Brother Dick Cripe, the charging party, made his opening statements to the Trial Board, then proceeded to present each charge separately. Article XXVII, Section 1, Subsection 3, the violation of any provision of this Constitution and the rules herein, or the by-laws, working agreements or rules of a Local Union, all the following charges will act as proof of this violation of this section. Article XXVII, Section 1, Subsection 4, Having knowledge of the violation of any provisions of this Constitution or the By-Laws or rules of a Local Union yet failing to file charges against the offenders, or to notify the proper officers of the Local Union. Brother Cripe said on August 12, 1974, sister Pappas had knowledge of her violation, and had knowledge of others who were also working with the Company, Precision Plastic, Mfg. Company, that was in difficulty with Local 1969, she also had knowledge of members who were going to resign from Local 1969 and did not file charges against offenders or notify Local 1969 officers.

Article XXVII, Section 1, Subsection 10, working in the interest of any organization or cause which is detrimental to, or opposed to the IBEW.

Brother Cripe said sister Pappas was working for a cause that was detremental [sic] to the IBEW and Labor movement.

Article XXVII, Section 1, Subsection 21, working for any individual or company declared in difficulty with a Local Union or the IBEW in accordance with this constitution,

Brother Cripe also said sister Pappas was working in behalf of a company in difficulty with the Local Union by resigning from union to go back to work, and seeking information from other employees on how to resign from the union and go back to work.

Sister Pappas presented her defense. She said she was self supporting, but did not try to seek assistance from the Local Union or any agency. She had been a union member since 1950, has never attended a General Membership Meeting, did not attend the ratification meeting of August 16, 1974. Sister Pappas did picket two weeks and drew pay for one week, she said she didn't picket any more because of violence but admitted she didn't see any violence on the lines. She crossed the line and went to work for one week of the strike. Sister Pappas said she thought only of herself and that Wil Klatt called the N.L.R.B. just prior to her going back to work and was told how to resign from a union which she in turn told sister Pappas. Sister Pappas then sent a letter of resignation to Local 1969 dated August 10, 1974 which was received in the office August 12, 1974. Both parties, Dick Cripe and Victoria Pappas, were questioned by President Knezevich and then asked if they felt they had a full opportunity to present their case, both agreed they had and were then dismissed. Sister Pappas was then told, the decision of the Trial Board would be mailed to her.

Charges and hearing was [sic] discussed by the Trial Board and after due consideration of all evidence presented by both parties, the Board acted on the charges.

The decision of the Trial Board is as follows:

Guilty of Article XXVII, Section 1, Subsection 3, all charges acted as proof of Subsection 3—

Guilty of Article XXVII, Section 1, Subsection 4, Sister Pappas by her evidence presented showed that she had knowledge of others preparing to resign from the IBEW Local No. 1969, and did not file charges, or notify union officers—

Guilty of Article XXVII, Section 1, Subsection 10, she was working for a cause detremental [sic] to the IBEW, Local No. 1969, by consorting with a group to seperate [sic] herself from the union—

Guilty of Article XXVII, Section 1, Subsection 21, prior to her resignation of August 10, 1974 she was working in behalf of the Company, Precision Plastics, knowing the IBEW, Local No. 1969, was in difficulty with the aforementioned Company.

The Penalty is as follows: Based on the facts presented by both parties Sister Pappas is assessed Two Hundred Dollars ($200.00).

Second Called: Maxine Stones—

Maxine was charged with violating Article XXVII, Section 1, Subsection 3, 4, 10, 16 and 21 of the IBEW International Constitution.

The charges were read in her presence by President John Knezevich. President Knezevich asked her how she pleaded, her response was not guilty of all charges.

Brother Dick Cripe, the charging party, made his opening statements to the Trial Board, then proceeded to present each charge seperately [sic].

Article XXVII, Section 1, Subsection 3, violation of any provision of this Constitution and the rules herein, or the by-laws, working agreement, or rules of a Local Union, he said that all charges acted as proof of subsection 3,

Article XXVII, Section 1, Subsection 4, Having knowledge of the violation of any provisions of this Constitution or the By-Laws or rules of a Local Union, yet failing to file charges against the offender or to notify the proper officers of the Local Union, brother Cripe, said on August 2, 1974, sister Stones applied for resignation from Local 1969, and from the paper used, the typing and watermarks, on the resignation letter he believed that her letter and several others were a conspiracy of a group of members to resign from Local 1969 which all appeared to have used the same paper, draft and typewriter. He said each time something came up with the Company President, he gave him (Cripe) reason to believe sister Stones was giving information to the company, that was for union members only, brother Cripe said he believed sister Stones also had knowledge of others planning on resigning from Local 1969 and did not file charges or notify Local Union officers,

Article XXVII, Section 1, Subsection 10, working in the interest of any organization or cause which is detremental [sic] to or opposed to the IBEW, brother Cripe said by working in the interest of the company, and conspiring with others on how to resign from the union, he feels this prolonged the strike for other members,

Article XXVII, Section 1, Subsection 16, attending or participating in any gathering or meeting whatsoever for the purpose of advocating dual unionism, secession, schism, unauthorized work stoppage or strike or other violations of the laws and rules of the IBEW or Local union. From testimony given she was seen on July 31, 1974, after the union meeting, with the group of people who later resigned from Local 1969, sister Stones said Wil Klatt gave her the letter of resignation which she (Stones) mailed to Local 1969,

Article XXVII, Section 1, Subsection 14, making known the business of a Local Union to persons not entitled to such knowledge, brother Cripe said, when anything came up with the company, it would come out that the company knew what was being said by members and other business that was not of the companies [sic] business, which lead him to believe sister Stones was passing on information to the Company that was only for union members,

Article XXVII, Section 1, Subsection 21, working for any individual or company declared in difficulty with a Local Union or the IBEW in acordance with this Constitution, prior to sister Stones resignation of August 2, 1974, she was seen with a group of people that later sent in for resignation from Local 1969 (July 31, 1974) which was attended by sister Stones.

Sister Stones presented her defense. She said she feels she wasn't getting notices from the union as others did, altho information was available to her, and she could have asked the union Representatives for any information she wanted at any time.

Sister Stones became a union member about nine (9) years ago, in 1965. Did not attend any General Membership Meetings since joining the union. Sister Stones said her going back to work wasn't because she needed the money, but because she didn't like to be told what she could do or not do regarding being out on strike, she also said she did not like strikes, but she did like her job and employer, this was her reason for returning to work.

Her letter of resignation was sent to Local 1969 on August 2, 1974, she said Wil Klatt gave her the letter of resignation and she (Stones) then mailed it to the Local.

Sister Stones went back to work on August 5, 1974, worked three weeks during the strike, she said what she did, she did on her own. Sister Stones attended the July 31, 1974 union meeting, and it was after that day that she decided to go back to work, she said she told her husband to tell the company she would come back to work.

Sister Stones was questioned by the Trial Board, and both Sister Stones and Brother Cripe were asked if they had full opportunity to present their cases, both agreed, and were then dismissed.

Sister Stones was then told, the decision of the Trial Board would be mailed to her.

Charges and hearing was [sic] discussed by the Trial Board and after due consideration of all evidence presented by both parties, the Board acted on the charges.

The decision of the Trial Board is as follows:
Guilty of Article XXVII, Section 1, Subsection 3, all charges acted as proof of Subsection 3—

Guilty of Article XXVII, Section 1, Subsection 4, sister Stones had knowledge of others preparing to seperate [sic] from IBEW, Local No. 1969, and did not file charges,

Guilty of Article XXVII, Section 1, Subsection 10, sister Stones was working for a cause detremental [sic] to the IBEW, Local No. 1969 by consorting with a group to seperate [sic] herself from the Local Union No. 1969,

Not Guilty of Article XXVII, Section 1, Subsection 14, the Trial Board did not think sufficient evidence was presented to prove that sister Stones was the one making known the business of the Local Union to persons not entitled to the knowledge,

Guilty of Article XXVII, Section 1, Subsection 16, attending and participating in a meeting, for the purpose of advocating resignation of members from the IBEW, Local No. 1969, prior to her resignation of [sic] the union.

Guilty of Article XXVII, Section 1, Subsection 21, prior to her resignation from the IBEW, Local No. 1969, sister Stones was working in the behalf of the company knowing at that time that IBEW, Local No. 1969 was in difficulty with the Company.

The Penalty is as follows: Based on the facts presented by both parties sister Stones is assessed Six Hundred Dollars ($600.00).

Third Called: Wil Klatt—

Wil Klatt was charged with violating Article XXVII, Section 1, Subsection 3, 6, 9, 10, 16 and 21 of the IBEW International Constitution.

The charges were read in her presence by President John Knezevich. President Knezevich asked her how she pleaded, her response was not guilty of all charges.

Brother Cripe, the charging party, made his opening statements to the Trial Board, then proceeded to present each charge seperately [sic].

Article XXVII, Section 1, Subsection 3, the violation of any provision of this Constitution and the rules herein, or the By-Laws, working agreements or rules of a Local Union, all the following charges will act as proof of this violation of this section.

Article XXVII, Section 1, Subsection 6, advocating or attempting to bring about a withdrawal from the IBEW or any Local Union, or of any member or groups of members, brother Cripe called sister Elsie Smith as a witness. He asked her if Wil Klatt acted at any time within a group to bring about a withdrawal from Local No. 1969. Sister Smith said she believed Wil did, as letters of resignation sent to Local were all the same, and that Wil was with a group who created dissent also that she (Smith) talked to a member, Anne Walls, employed at Precision Plastics, and Anne said the Company had put out a letter that their jobs would no longer be there if the people didn't return to work, sister Walls called the company and the President told her how to go about withdrawing from the union and that for more information she could call Wil Klatt, and Wil had a way that would be agreeable to all on how to get back together. Brother Cripe called Richard (Steve) Pino as a witness, brother Cripe asked Pino if he went to one of the employee's home, Francis

Kaona's, and if Wil Klatt, Rebecca Bise and Francis Kaona were there. Pino said he did go, and went for the sole purpose of trying to talk Wil Klatt out of crossing the picket line, as he heard Wil was going to go back to work while strike was still on, Wil Klatt told Richard Pino that she had talked to Appelblom, President of Precision Plastics and he told her he was not going to give what the union asked for, Wil told Richard at that time, she was going to go to work and cross the picket line. This meeting was previous to settling of the strike at Precision Plastics, the witness was dismissed. Brother Cripe called, Donald Shoblo, as his second witness. Brother Cripe asked Don Shoblo if he had any discussion with Wil Klatt or other people who had crossed the picket line, and if they had talked to the company during the strike? Brother Shoblo said Wil Klatt and Danny Carr said they had talked to the Company and they didn't like the strike, both Wil Klatt and Danny Carr went back to work August 5, 1974. Donald Shoblo said Wil Klatt told him she had talked to Mr. Appelblom, President of Precision Plastics, and he told her he would not give arbitration, this is when Wil Klatt told him that the NLRB had told her they could go back to work. Witness was dismissed.

Article XXVII, Section 1, Subsection 9, creating or attempting to creat dissatisfaction or dessention [sic] among any of the members or among Local Unions of the IBEW. The above testimony of sister Smith, brother Pino and brother Shoblo, cover this, their testimony states she was contacting the Company and conspiring with others on how to resign from the union and go back to work, she was also seen in a meeting with others and was telling them how to go about resigning—

Article XXVII, Section 1, Subsection 10, working in the interest of any organization or cause which is detremental [sic] to or opposed to the IBEW.

According to the above testimony of the three witnesses, Wil Klatt was working for a cause detremental [sic] to the IBEW, by conspiring with the Company and consorting with a group to separate [sic] from the Local Union.

Article XXVII, Section 1, Subsection 16, attending or participating in any gathering or meeting whatsoever for the purpose of advocating dual unionism, secession, schism, unauthorized work stoppage or strikes or other violations of the By-Laws and rules of the IBEW or it's [sic] Local Union. According to testimony of sister Smith, brother Pino and brother Shoblo, Wil Klatt prior to the resignation from the union had been seen participating in a meeting, and advocated resignation of members from the IBEW Local 1969.

Article XXVII, Section 1, Subsection 21, working for any individual or company declared in difficulty with a local union or the IBEW in accordance with this Constitution, according to testimony of the three witnesses, prior to Wil Klatt's resignation from the union, Wil was working in behalf of the company knowing at that time that the IBEW Local No. 1969 was in difficulty with Precision Plastic. In the testimony of Wil Klatt she said Anne Walls called her, and she told her to call the NLRB and that she did not advise her, Wil said she told Shoblo it was her opinion that Precision Plastics would not give arbitration, and that she had not talked to Mr. Appelblom, Wil continued to say she stayed out three weeks of the strike and that a friend told

her to contact the NLRB, and this is how she came to resign. Wil said the meeting with other people was prior to August 2, 1974. Wil Klatt had been a member of the IBEW for twelve years, she said she had not had problems with the union in the past. Wil did not pull any picket duty during the strike, she did not apply to the union for assistance either. Wil Klatt said a personal thing caused her to go back to work, and said her needs were fulfilled when she went back to work.

Brother Cripe said during negotiations a statement was made that Wil took exception too, [sic] (and repeated to her by the Company), Wil Klatt called the Company on a Friday and told them she would be to work the following Monday. Wil Klatt said she gave out information on how to resign to anyone who wanted it. She attended the July 31, 1974 meeting and said that Lillian Ornellas, Rebecca Bise and Wil went into the Company after the meeting, Wil said she went for vacation check, said Rebecca Bise also got her vacation check. Wil Klatt said "I was a part of management, but I also do production work, therefore I must be a member of the Union".

President Knezevich, asked both Brother Cripe and Wil Klatt, if they had a fair chance to present their case, bothe [sic] said they did. They were then dismissed.

Wil Klatt was then told, the decision of the Trial Board would be mailed.

Charges and hearing was discussed by the Trial Board and after due consideration of all evidence presented by both parties, the Board acted on the charges.

The decision of the Trial Board is as follows:

Guilty of Article XXVII, Section 1, Subsection 3, all charges acted as proof of subsection 3,

Guilty of Article XXVII, Section 6, due to evidence, Wil Klatt was found to be instramental [sic] in getting information and advocating to others how to go about resigning from the Local Union No. 1969,

Guilty of Article XXVII, Section 1, Subsection 9, in meeting with others to advocate resignation, her dissatisfaction caused dissention among other union members.

Guilty of Article XXVII, Section 1, Subsection 10, working for a cause detremental [sic] to the IBEW Local No. 1969 by consorting with a group to separate [sic] from the union,

Guilty of Article XXVII, Section 1, Subsection 16, attending and participating in a meeting prior to the resignation for the purpose of advocating resignation of members from the Local Union No. 1969,

Guilty of Article XXVII, Section 1, Subsection 21, prior to the resignation Wil was working in behalf of the company knowing IBEW Local No. 1969 was at that time declared in difficulty with Precision Plastics,

The Penalty is as follows: Based on the facts presented by both parties Wil Klatt is assessed Eight Hundred Dollard ($800.00).

Fourth Called: Rebecca Bise—

Rebecca Bise was Charged with violating Article XXVII, Section 1, Subsection 3, 4, 7, 8, 9, 10, 14, 16 and 21 of the IBEW International Constitution.

The charges were read in her presence by President John Knezevich. President Knezevich asked her how she pleaded, her respose [sic] was not guilty of all charges.

Brother Dick Cripe, the charging party, made his opening statements to the Trial Board, then proceeded to present each charge separately. *****

Article XXVII, Section 1, Subsection 3, violation of any provision of this Constitution and the rules herein, or the By-Laws, working agreement, or rules of a Local Union, he said that all charges acted as proof of subsection 3, ***** Sister Bise sent her letter of resignation on August 2, 1974, it was received in the office August 5, 1974, all charges are previous to that date.

Article XXVII, Section 1, Subsection 4, having knowledge of the violations of any provisions of this Constitution, or the By-Laws or rules of a Local Union, yet failing to file charges against the offender, or to notify the proper officers of the Local Union, Brother Cripe, said Sister Bise had attended meeting where Wil Klatt, Frances Kaona, and Richard Pino were present and that sister Bise was aware of plans of others to resign but did not file charges or notify the union officers of those plans, Brother Cripe, then called Richard (Steve) Pino as a witness, Brother Cripe asked Pino if he attended a meeting where Rebecca Bise was present, he said "he had", It [sic] was a meeting where he talked to Wil Klatt, and said Rebecca Bise heard the discussion he had with Wil Klatt, asking Wil to reconsider her position on crossing the picket line and go back to work, witness was dismissed. Brother Cripe called Sister Elsie Smith as his second witness, he asked sister Smith if she knew of any involvement of Rebecca Bise telling people she

was going to work thru the picket lines, sister Smith said, sister Renia Reyes, an employee of Precision Plastics, said Rebecca Bise had called her and told her she was going to cross the picket line, sister Smith, recently became aware of conversation between sister Bise and Reyes, sister Smith was dismissed. Brother Cripe called Brother Don Shoblo as his third witness and asked brother Shoblo if he had any information that Rebecca Bise had talked to the Company, he said Rebecca told her they would never give arbitration in the union contract, witness brother Don Shoblo was dismissed,

Article XXVII, Section 1, Subsection 7, publishing or circulating among the membership or among Local Union false reports or misrepresentations, Brother Cripe said Rebecca Bise made oral statements and misrepresentations that were untrue to other members,

Article XXVII, Section 1, Subsection 8, sending letters or statements anonymous or otherwise, or making oral statements to public officals which contain untruth about or which misrepresent a local union, its officers or representatives of the IBEW, Brother Cripe said Sister Bise did make oral statements and representations to other members that were untrue,

Article XXVII, Section 1, Subsection 9, creating or attempting to create dissatisfaction or dissension among any of the members or among Local Unions of the IBEW, Brother Cripe said Sister Bise was creating dissension among other members, by discussing her discontentment with others, and attending meetings with others for the purpose of advocating withdrawal from the Local Union,

Article XXVII, Section 1, Subsection 10, Sister Bise was working for a cause detrimental to the IBEW, Local No. 1969 by meeting and consorting with a group to separate herself from the Local Union 1969,

Article XXVII, Section 1, Subsection 14, making known the business of a Local Union to persons not entitled to such knowledge, according to testimony she told Brother Shoblo she had talked to the Company,

Article XXVII, Section 1, Subsection 16, attending or participating in any gathering or meeting whatsoever for the purpose of advocating dual unionism, secession, schism, unauthorized work stoppage, strikes or other violations of the By-Laws and rules of the IBEW or it's Local Union. Sister Bise according to testimony had attended and participated in a meeting prior to her resignation for the purpose of advocating resignation of members from Local Union 1969,

Article XXVII, Section 1, Subsection 21, working for any individual or company declared in difficulty with a Local Union or the IBEW in accordance with this Constitution, according to testimony from Brother Cripe and all witnesses, Sister Bise prior to her resignation was working in behalf of the Company, knowing that the IBEW Local No. 1969, was at that time in difficulty with Precision Plastics. Sister Bise presented her defense, she said financial problems was why she returned to work through the picket lines, she said she did not believe in unions and did not feel the union should expect her to stay out on strike. She has been a union member almost two years. Sister Bise said she did picket two weeks and went through the picket line

the fourth week of the strike, she went to the union meeting of July 14, 1974, doesn't remember if she went to the July 31, 1974 meeting.

She was asked if she typed her own letter of resignation, she replied she did and that each person typed their own, sister Bise did not contact the union or any agency for assistance during the strike. Sister Bise said she didn't believe in what the members were fighting for at Precision Plastics, she said all letters of resignation were typed on Francis Kaona's typewriter, she said Claude Stones told them about the NLRB.

Sister Bise said she got her vacation check when she went into the Company on July 31, 1974, she said a union Representative from another union typed a form letter for their resignation, she said it was after the meeting of July 31, 1974 when she got her vacation check and told the Company she was coming back to work through the picket line.

Brother Cripe informed all members at July 31, 1974 meeting, that any one that crossed lines and went back to work would have charges preferred against them.

Sister Bise was asked why she crossed the picket line, and she said financial problems. She did not contact the union office, or apply to any agency for assistance.

Brother Cripe, asked all the members of Precision Plastics at the July 31, 1974 meeting, that if any of them objected to staying out to please stand up and explain their reasons and no one stood up, the contract was again rejected by a two-thirds majority at that meeting. Sister Bise apologized for what she said at July 31, 1974 meeting, and

said Harold Appelblom of Precision Plastics called her and Wil Klatt and told them of a statement made in negotiations, sister Bise said she had regrets for having had [sic] crossed the picket line and said she explained to other people why she crossed the line.

Brother Cripe and sister Bise were asked if they had a fair chance to present their case, and both said they did have. This was asked by the Trial Board. They were then dismissed.

Sister Bise was then told, the decision of the Trial Board would be mailed to her.

Charges and hearing was [sic] discussed by the Trial Board and after due consideration of all evidence presented by both parties, the Board acted on the charges.

The decision of the Trial Board is as follows:

Guilty of Article XXVII, Section 1, Subsection 3, all charges acted as proof of subsection 3,

Guilty of Article XXVII, Section 1, Subsection 4, due to testimony of all witnesses sister Bise had knowledge of others planning to resign from Local No. 1969 and did not file charges or notify the Local Union or its officers,

Guilty of Article XXVII, Section 1, Subsection 7 & 8, was found guilty of circulating misrepresentations of facts,

Guilty of Article XXVII, Section 1, Subsection 9, in the meeting she attended to advocate resignation, her dissatisfaction caused dissension among other union members,

Guilty of Article XXVII, Section 1, Subsection 10, working for a cause detremental [sic] to the IBEW Local Union No.

1969, by consorting with a group to separate herself from the union,

Guilty of Article XXVII, Section 1, Subsection 14, making known the business of the union to company officials,

Guilty of Article XXVII, Section 1, Subsection 16, attending and participating in a meeting prior to her resignation for the purpose of advocating resignation of members from the IBEW Local No. 1969,

Guilty of Article XXVII, Section 1, Subsection 21, prior to her resignation of August 2, 1974, she was working in the interest or behalf of the company, knowing that the IBEW Local Union No. 1969 was at that time declared in difficulty with the Company, Precision Plastics.

The Penalty is as follows: Based on the facts presented by both parties Sister Bise is assessed Three Hundred Dollars ($300.00).

With no further business the meeting was adjourned at 11:30 P.M.

Respectfully submitted

Mary J. Faulkner
Recording Secretary
IBEW, L.U. 1969

DEFENDANTS EXHIBIT No. 1,003

TRIAL BOARD HEARING

October 10, 1974

The meeting was called to order at 6:00 P.M. by President John Knezevich. Roll Call of Officers as follows:

President	John Knezevich
Vice President	Ada Clanton
Treasurer	John Thomas —absent
Ex. Board Member	Wayne Buenger —absent
Ex. Board Member	Joe Berghone
Ex. Board Member	Tony Laurio
Ex. Board Member	Dorothy Ackerman
Ex. Board Member	Noreen Zanoni
Recording Secretary	Mary Faulkner

In accordance with the IBEW Constitution, Article XXVII, Section 11, this is a properly constituted Trial Board.

Charges have been preferred by Brother Richard (Dick) Cripe, Assistant Business Manager of the IBEW Local 1969, against the following members employed at Precision Plastics, Mfg. Company, 340 Roebling Road, South San Francisco, California 94080.

All were notified in accordance with Article XXVII, Section 4 of the IBEW Constitution.

Local No. 1969 of the IBEW was on a sanctioned strike against Precision Plastics, Mfg. Company from July 15, 1974 to August 19, 1974.

First Called: Francis Kaona—

Sister Kaona was charged with violating Article XXVII, Section 1, Subsection 3, 4, 6, 9, 14, 16 and 21 of the IBEW International Constitution.

The charges were read in her presence by President John Knezevich. President Knezevich asked her how she pleaded, her response was not guilty of all charges.

Brother Dick Cripe, the charging party, made his opening statements to the Trial Board, then proceeded to present each charge separately.

Article XXVII, Section 1, Subsection 3, the violation of any provision of this Constitution and the rules herein, or the By-Laws, working agreements or rules of a Local Union, brother Cripe said all charges act as proof of this violation, subsection 3,

Article XXVII, Section 1, Subsection 4, having knowledge of the violation of any provisions of this Constitution or the By-Laws or rules of a Local Union yet failing to file charges against the offenders, or to notify the proper officers of the Local Union, subsection 6, 9, 14, 16 and 21.

On August 2, 1974, sister Kaona sent in a letter for resignation from the Local Union, received in Local Union office August 5, 1974. Brother Cripe said all charges were for time previous to August 2, 1974 and that sister Kaona's letter was a form letter, written on the same paper and typewriter as other letters sent in from by [sic] other members resigning at the same time. Brother Cripe said prior to letter of resignation being sent in, sister Kaona was working in a conserted [sic] group to undermine the union, therefore causing a long strike, she also had knowledge of

others doing the same and did not file charges or notify the Local Union officers,

Article 21, Section 1, Subsection 6, advocating or attempting to bring about a withdrawal from the IBEW of any Local Union or of any member or group of members, sister Kaona by her own admission said the members who resigned came to her home to type their letters of resignation prior to August 2, 1974, and typed them on her typewriter,

Article XXVII, Section 1, Subsection 9, creating or attempting to create dissatisfaction or dissension among any of the members or among Local Unions of the IBEW, brother Cripe, stated that witness Pino had testified he had been to the home of Francis Kaona where others were present, Pino said he had asked her not to go to work through the picket line,

Article XXVII, Section 1, Subsection 14, making known the business of a Local Union to persons not entitled to such knowledge, by her own admission Francis Kaona went to the Company of [sic] July 31, 1974, picked up her vacation check, talked to the company and told them she was coming back to work, Article XXVII, Section 1, Subsection 16, attending or participating in any gathering or meeting what soever [sic] for the purpose of advocating dual unionism, secession, schism, unauthorized work stoppage or strikes, or other violations of the laws and rules of the IBEW or it's [sic] Local Union, by testimony given by brother Pino, sister Kaona was at a meeting at her home prior to her resignation for the purpose of advocating resignation of members from IBEW Local 1969, Article

XXVII, Section 1, Subsection 21, working for any individual or company declared in difficulty with a Local Union or the IBEW in accordance with this Constitution, according to testimony from brother Pino, and by her own admission she was planing [sic] to go through the picket line to work, and you also had a conversation with the company on July 31, 1974 prior to your resignation of August 2, 1974 she was working in behalf of the company knowing IBEW Local 1969 was at that time in labor difficulty with Precision Plastics.

Sister Kaona presented her defense. She said she went back to work for financial reasons, sister Kaona also said she had been a union member for one year and 8 months, she did picket and was payed for one week, she confirmed that all letters were typed on her typewriter. When she left the July 31, 1974 meeting with the union she went to the company after the meeting to pick up her vacation check at that time she talked to the company and told them she was thinking about coming back to work, sister Kaona said when brother Pino asked her not to go back to work and cross the picket line, she was upset with him, she said she decided to go back to work two days before she went back. Sister Kaona did not contact the Local Union for assistance during the strike and did not contact any other agency for assistance, she said she prefered going back to work rather than ask for help. Sister Kaona said she talked to Claude Stones, Foreman at Precision Plastics, right after the July 31, 1974 meeting, she said she talked about the people being foolish to remain on strike. Sister Kaona said the night that Pino came to her home, she was aware that Wil Klatt was going back to work, she

said she also know [sic] charges could be brought against them but didn't seem to care at that time, she said brother Cripe informed them at the July 31, 1974 meeting that charges would be brought against the ones going through the lines, she said brother Cripe asked people who were opposed to the strike to speak at the meeting, and no one did, sister Kaona said she asked Wil Klatt to let her see her letter of resignation, she also had legal advice from a friend on her action, he told her charges would be brought against her but she had a way to fight back, she would not reveal the friends [sic] name. Sister Kaona said she didn't like the union or unions, and that she had no qualms about her action.

Brother Cripe said about one year ago sister Kaona was fired from her job and the union was instramental [sic] in her getting her job back. Sister Kaona worked about two weeks of the strike.

Sister Kaona was questioned by Trial Board. Brother Cripe and sister Kaona were asked if they had full opportunity to present their cases, both said they had. Sister Kaona was then told, the decision of the Trial Board would be mailed to her.

Charges and hearing was [sic] discussed by the Trial Board and after due consideration of all evidence presented by both parties, the Board acted on the charges.

The decision of the Trial Board is as follows:

Guilty of Article XXVII, Section 1, Subsection 3, all charges acted as proof of subsection 3,

Guilty of Article XXVII, Section 1, Subsection 4, due to testimony of witnesses and brother Cripe, sister kaona [sic] had knowledge of others preparing to seperate [sic] from Local 1969, and did not file charges or notify the union officers,

Guilty of Article XXVII, Section 1, Subsection 6, advocating or attempting to bring about a withdrawal from the IBEW or any Local Union, or of any group of members, sister Kaona was found guilty of being instramental [sic] in advocating a group of members to resign from Local 1969,

Guilty of Article XXVII, Section 1, Subsection 9, creating or attempting to create dissatisfaction or dissension among any of the members or among Local Union of the IBEW, sister Kaona was found guilty of being at a meeting to advocate resignation, and her dissatisfaction caused dissension among other union members,

Guilty of Article XXVII, Section 1, Subsection 14, making known the business of a Local Union to persons not entitled to such knowledge, sister Kaona was found guilty of making known the business of the union to company officials, by her own admission and testimony of others,

Guilty of Article XXVII, Section 1, Subsection 16, attending or participating in any gathering or meeting, what so ever for the purpose of advocating dual unionism, secession, schism unauthorized work stoppages or strikes or other violation of the laws and rules of the IBEW or it's [sic] Local Union, sister Kaona was found guilty of attending and participating in a meeting prior to her resignation,

for the purpose of advocating resignation of members from IBEW Local 1969,

Guilty of Article XXVII, Section 1, Subsection 21, sister Kaona was found guilty of working in the behalf of the company knowing that IBEW Local 1969 was at the time in declared difficulty with Precision Plastics.

The Penalty is as follows: Based on the facts presented by both parties Sister Kaona is assessed Seven Hundred Dollars ($700.00).

Second Case Heard: Lillian Ornellas—

Sister Ornellas was charged with violating Article XXVII, Section 1, Subsection 3,4,9,10,14,16 and 21 of the International Brotherhood of Electrical Workers Constitution. Sister Ornellas was not present, was notified of time and place of trial but chose not to appear, the Trial Board proceeded with Trial in accordance with Article XXVII, Section 7, of the IBEW International Constitution. *****

Brotner Dick Cripe, the charging party, made his opening statements to the Trial Board, then proceeded to present each charge seperately [sic].

*****President John Knezevich read the charges to the Trial Board.

Sister Ornellas, mailed a letter of resignation to the Local Union office on August 2, 1974, received in the office on August 2, 1974.

Brother Cripe said charges are previous to August 2, 1974.

Article XXVII, Section 1, Subsection 3, violations of any provision of this Constitution and the rules herein or the

by-laws working agreements or rules of a Local Union, brother Cripe said all charges act as proof of subsection 3, (sub. 4,9,10,14,16,21)

Article XXVII, Section 1, Subsection 4, having knowledge of the violation of any provisions of this Constitution or the By-Laws or rules of a Local Union, yet failing to file charges against the offender or to notify the proper officers of the Local Union, brother Cripe stated that sister Ornellas was part of a group at Precision Plastics, who mailed letters of resignation on August 2, 1974, and said on July 31, 1974 after meeting she was seen with a group around a truck owned by Claude Stones, Foreman at Precision Plastics.

Brother Cripe said, sister Ornellas suggested to three of her friends to go to work at Precision Plastics, thru the picket lines, and that she took them to work during strike, and they are still working at Precision Plastics.

Brother Cripe said by doing this it helped to prolong the strike for other members there.

Sister Ornellas attended July 31, 1974 meeting, later seen with group around Claude Stones' truck, then went into Company same day. Does not think she picked up vacation check that day. Sister Ornellas approached Business Representative Elsie Smith on her finicial [sic] problems, after this same meeting the Union held with members. Then told Representative Smith she had to check further with the N.L.R.B.

Sister Ornellas received some picket pay, however sometimes she didnot [sic] show up for picketing. Brother Cripe gave Sister Ornellas a list of places she might get aid.

Sister Ornellas has been a member of I.B.E.W. about two years. Sister Ornellas went back to work Aug. 5, 1974.

Article XXVII Section 1, subsection 9, creating or attempting to create dissension among any of the members or among Local Unions of the IBEW.

Brother Cripe said by meeting to advocate resignation, and showing dissatisfaction, Sister Ornellas caused dissention among other members.

Article XXVII, Section 1, subsection 10, working in the interest of any organization or cause which is detrimental to, or opposed to, the IBEW, by consorting with a group, to seperate [sic] themselves from the union, they were working for a cause detrimental to the IBEW Local No. 1969,

Article XXVII, Section 1, Subsection 14, making known the business of a Local Union to persons not entitled to such knowledge. Sister Ornellas according to testimony went through the picket lines to talk to the Company on July 31, 1974, prior to her resignation.

Article XXVII, Section 1, Subsection 16, attending or participating in any gathering or meeting whatsoever for the purpose of advocating dual unionism, secession, schism unauthorized work stoppage or strikes or other violations of the laws and rules of the IBEW or it's [sic] Local Union, Brother Cripe said sister Ornellas was seen with a group of people July 31, 1974, after the union meeting, this is the same group that sent in resignations on August 2, 1974 and the same group of people that went into [sic] see the company that same day,

Article XXVII, Section 1, Subsection 21, working for any individual or company declared to be in difficulty with a local union or the IBEW, in accordance with the Constitution, testimony of brother Cripe shows that prior to sister Ornellas resignation she was working in behalf of the company by having three friends go through the picket lines to work and by transporting them to and from work, knowing at that time that IBEW Local 1969 was declared in difficulty with Precision Plastics.

Charges and hearing was [sic] discussed by the Trial Board and after due consideration of all evidence presented by both parties, the Board acted on the charges.

The decision of the Trial Board is as follows:

Guilty of Article XXVII, Section 1, Subsection 3, all charges act as proof of subsection 3,

Guilty of Article XXVII, Section 1, Subsection 4, sister Ornellas was found guilty of having knowledge of others preparing to separate from IBEW Local No. 1969 and did not file charges, or notify the proper union officers,

Guilty of Article XXVII, Section 1, Subsection 9, sister Ornellas in meeting to advocate resignation, her dissatisfaction caused dissension among other union members,

Guilty of Article XXVII, Section 1, Subsection 10, sister Ornellas was found guilty of working for a cause detrimental to IBEW Local No. 1969 by consorting with a group of people to seperate [sic] themselves from the union,

Guilty of Article XXVII, Section 1, Subsection 14, found guilty of making known the business of a Local Union to company officials,

Guilty of Article XXVII, Section 1, Subsection 16, attending and participating in a meeting, prior to her resignation for the purpose of advocating resignation of members from IBEW Local No. 1969,

Guilty of Article XXVII, Section 1, Subsection 21, prior to her resignation sister Ornellas was working in behalf of the company knowing IBEW Local No. 1969 was at that time declared in difficulty with Precision Plastics.

The Penalty is as follows: Based on the facts presented by both parties Sister Ornellas is assessed Eight Hundred Dollars and Fifty, ($850.00).

Sister Ornellas will be sent a letter of the finding of the Trial Board Hearing.

Third Case Heard: Renate Bingham

Sister Bingham was notified of the time and place of the trial, but chose not to appear, and did not contact the union office. President Knezevich called her early in the evening, October 10, 1974, and she told him she wouldn't be coming to the trial, the Trial Board proceeded in accordance with Article XXVII, Section 7 of the IBEW Constitution.

Sister Bingham was charged with violation of Article XXVII, Section 1, Subsection 3, 4, 10 and 21 of the IBEW Constitution, charges were preferred by brother Dick Cripe, Assistant Business Manager of Local 1969.

President Knezevich read the charges to the Trial Board.

Brother Cripe the charging party made his opening statements to the Trial Board, then presented each charge seperately [sic].

Sister Bingham sent in her letter of resignation, August 10, 1974, received in the office, Auguat 12, 1974, all charges are dealing with activity prior to August 10, 1974.

Article XXVII, Section 1, Subsection 3, violation of any provision of this Constitution, and the rules herein, or the By-Laws, working agreements, or rules of a Local Union, brother Cipre [sic] said all charges act as proof of violation of subsection 3, (sub. 4,10,21),

Article XXVII, Section 1, Subsection 4, having knowledge of the violation of any provision of this Constitution, or the By-Laws or rules of a Local Union, yet failing to file charges against the offender or to notify the proper officers of the Local Union, brother Cripe stated that sister Bingham said at the July 14, 1974, meeting that she intended to go to work, also informed the negotiation committee that she planed [sic] to work, at that time brother Cripe informed all members at the meeting to be cautious about crossing the picket line, brother Cripe said sister Bingham talked of taking a Withdrawal from Local No. 1969, but instead sent in a letter of resignation, August 10, 1974 and returned to work Aug. 12, 1974. Brother Cripe said he was not aware of any bad finicial [sic] problems that Sister Bingham may have had. She did not contact the Union at any time for advice or assistance during strike, and said Sister Bingham's attitude was totally anti-union.

Sister Bingham has been in the Union less than two years. Brother Cripe said Sister Bingham did cause dissension among other members by saying she was going to work, and her showing her dissatisfaction [sic] helped to

prolong the strike or other members. She did this knowing it was a violation of the constitution.

Article XXVII, Section 1, subsection 10, working in the interest of any organization or cause which is detremental [sic] to or opposed to the IBEW.

Brother Cripe stated that Sister Bingham said she was going to work during strike, and by showing her dissatisfaction and anti-union attitude to other members, she was working for a cause detremental [sic] to the IBEW Local 1969, Article XXVII, Section 1 Subsection 21, working for any individual or company declared in difficulty with a local union, or the IBEW in accordance with this Constitution.

Brother Cripe's testimony shows that prior to sister Bingham resigning she was working in behalf of the coming [sic], knowing IBEW Local 1969 was at that time in difficulty with Precision Plastics.

The Trial Board discussed the charges and after due consideration of the evidence, acted upon the charges and decision of the Trial Board is as follows:

Guilty of Article XXVII, Section 1, Subsection 4, sister Renate Bingham was found guilty of having knowledge of others who violated the IBEW Constitution, and did not attempt to file charges against those members, or notify proper union officials,

Guilty of Article XXVII, Section 1, Subsection 10, guilty of working for a cause detrimental to the IBEW Local No. 1969, by consorting with the company,

Guilty of Article XXVII, Section 1, Subsection 21, guilty of working with company officals [sic] employed by the

company that was declared in difficulty with Local Union No. 1969 of the IBEW.

The Penalty is as follows: Based on the facts presented by both parties Sister Bingham is assessed, Three Hundred Seventy Five Dollars ($375.00).

Fourth Case Heard: Danny Carr—

Brother Carr was notified of time and place of Trial Board Hearing, but chose not to appear, Business Representative Smith talked to him the day of the Trial and he said he wouldn't come, also President Knezevich called him early, the evening of the trial, October 10, 1974, but was unable to reach him at home or at work.

The Trial Board proceeded in accordance with Article XXVII, Section 7 of the IBEW Constitution.

Brother Danny Carr was charged with, violation of Article XXVII, Section 1, Subsection 3, 4, 10, 14 and 21 of the IBEW International Constitution.

Charges were preferred by, Brother Dick Cripe, Assistant Business Manager of Local 1969, President John Knezevich read the charges.

Brother Dick Cripe made his opening statements to the Trial Board, then presented each charge seperately [sic].

Brother Carr sent a letter of resignation to the union, Local 1969 on August 6, 1974 received in office August 7, 1974, previous to this time brother Carr had been active on the picket line doing picket duty once or twice each week. Brother Cripe said charges were for previous to August 6, 1974.

Brother Cripe said brother Carr sent a girl friend of his through the picket line to work, and a man friend of his the next work day, stating that if they went to work at that time he could afford to stay out longer. Brother Cripe informed him at that time that by sending others through the picket line was just as bad as going through himself. Brother Carr told brother Cripe that Harold Appelblom of Precision Plastics wanted him to come back to work and Mr. Appelblom told brother Cripe that he had gone to see brother Carr. Brother Cripe said brother Carr tried to persuade graveyard shift steward, Frank Talavera into crossing the picket line, brother Cripe said Brother Carr had financial problems.

According to testimony by brother Don Shoblo, brother Carr prior to August 6, 1974, was at meeting with others of the group that crossed the picket line, and resigned from IBEW Local 1969,

Article XXVII, Section 1, Subsection 3, violation of any provision of this Constitution, and the rules herein or the By-Laws, working agreements or rules of a Local Union, brother Cripe said all charges act as proof of Subsection 3, (4, 10, 14, 21)

Article XXVII, Section 1, Subsection 4, having knowledge of the violation of any provision of this Constitution or the By-Laws or rules of a Local Union, yet failing to file charges against the offenders or to notify the proper officers of the Local Union.

Brother Cripe's charges shows that Brother Carr did have knowledge of others who violated the IBEW Constitu-

tion, and did not make any attempt to file charges, or notify the proper union officers of the Local Union,

Article XXVII, Section 1, Subsection 10, working in the interest of any organization or cause which is detrimental to or opposed to the IBEW, testimony from brother Cripe and witness brother Shoblo show that brother Carr was guilty of working for a cause that was detrimental to the IBEW Local 1969, by consorting with the company prior to his resignation,

Article XXVII, Section 1, Subsection 14, making known the business of a Local Union to persons not entitled to such knowledge, testimony from brother Cripe, shows that brother Carr was confering [sic] with the company, brother Carr's admission that the company wanted him to come to work, and statement from Mr. Appelblom to brother Cripe that he had gone to see brother Carr previous to brother Carr's resignation from the IBEW Local 1969,

Article XXVII, Section 1, Subsection 21, working for any individual or company declared in difficulty with a Local Union or the IBEW in accordance with this Constitution, testimony of brother Cripe shows brother Carr was working with the company when it was declared in difficulty with Local Union 1969 of the IBEW.

The Trial Board discussed charges and after due consideration of the evidence acted upon the charges.

The decision of the Trial Board is as follows:

Guilty of Article XXVII, Section 1, Subsection 3, all charges act as proof of subsection 3,

Guilty of Article XXVII, Section 1, Subsection 4, guilty of having knowledge of others who violated the IBEW Constitution and did not make any attempt to file charges or inform the Local Union officers,

Guilty of Article XXVII, Section 1, Subsection 10, guilty of working for a cause detrimental to the IBEW Local No. 1969, by consorting with the company prior to your resignation,

Guilty of Article XXVII, Section 1, Subsection 14, making known the business of a local union, to persons not entitled to such knowledge, brother Carr was found guilty of making known the business of the union to company officials, Guilty of Article XXVII, Section 1, Subsection 21, working for any individual or company declared in difficulty with a local union or the IBEW in accordance with the constitution, brother Carr found guilty of working with the company when it was declared in difficulty with Local Union 1969 of the IBEW.

The Penalty is as follows: Based on the facts presented, assessed One Thousand Dollars ($1,000.00).

Brother Carr will be notified by letter of the decision of the Trial Board.

The date for the Trial of Stella Bradley will be set at November 7, 1974, Executive Board meeting night, with no further business the meeting was adjourned at 9:10 P.M.

Respectfully Submitted

Mary J. Faulkner, Rec. Secty.
Local Union No. 1969, IBEW

DEFENDANTS EXHIBIT NO. 1,004

TRIAL BOARD HEARING

November 7, 1974

The meeting was called to order at 7:00 P.M. by President John Knezevich.

Roll Call of Officers as follows:

President	John Knezevich
Vice President	Ada Clanton
Treasurer	John Thomas (absent)
Ex. Board Member	Joe Berghone
Ex. Board Member	Tony Laurio
Ex. Board Member	Dorothy Ackerman (excused)
Ex. Board Member	Noreen Zanoni (absent)
Ex. Board Member	Wayne Buenger (absent)
Recording Secretary	Mary Faulkner

In accordance with the IBEW Constitution, Article XXVII, Section 11, this is a properly constituted Trial Board.

Charges have been preferred by Brother Richard (Dick) Cripe, Assistant Business Manager of the IBEW Local No. 1969, against Stella Bradley, I.O. Number BA 2292328. She is employed at Precision Plastics, Mfg. Company, 340 Roebling Road, South San Francisco, California 94080.

Stella Bradley was notified in accordance with Article XXVII, Section 4 of the IBEW Constitution, of the time and place of the Trial but chose not to be present.

Trial Board proceeded [sic] with Trial in accordance with Article XXVII, Section of the IBEW Constitution.

The charges against Sister Stella Bradley were violation of Article XXVII, Section 1, Subsection 2, 4, 9 and 21 of the IBEW Constitution.

The charges were read to Trial Board by President John Knezevich.

Then Brother Richard Cripe made his opening statements to the Trial Board, each charge was presented separately. Brother Cripe said Stella Bradley joined L.U. 1969 5-2-73, he also said all charges were prior to August 2, 1974, as the date Sister Bradley sent her letter of resignation to the IBEW Local 1969. It was received in the union office August 5, 1974, Brother Cripe said that on August 5th, Stella Bradley crossed picket line, and went into Precision Plastics to work and that charges Article XXVII, Section 1, Subsection 4, 9 and 21 will prove Sub-section 3.

Article XXVII, Section 1, Sub-section 4, Having knowledge of the violation of any provision of this Constitution or the by-laws or rules of a Local Union yet failing to file charges against the offender or to notify the proper officers of the Local Union, Brother Cripe said letter of resignation from Stella Bradley was on same kind of paper, same water marks [sic] and typing as the letters of resignation from others that resigned from the local union on the same date, and that Stella Bradley had knowledge of at least three others resigning. They all met at Frances Kaonas [sic] house, and used her typewriter to type the letters, and he believed she was conspiring to draw others out of the union.

Article XXVII, Section 1, Subsection 9, creating or attempting to create dissatisfaction or dissention among any of the members or among Local Unions of the IBEW,

Assistant Business Manager Cripe said that Stella Bradley by meeting with a group and planing [sic] a means of resigning from the union, she helped create dissention in groups of members,

Article XXVII, Section 1, Subsection 21, working for any individual or company declared in difficulty with a Local Union or the IBEW, in accordance with this Constitution, Assistant Business Manager Cripe said Stella Bradley was working with the company while it was declared in difficulty with Local 1969, and she crossed the picket line and went to work prior to 8:00 A.M. on August 5, 1974.

The Trial Board discussed charges and after due consideration of evidence presented, they acted upon the charges.

Decision of the Trial Board is as follows:

Article XXVII, Section 1, Subsection 3, Guilty, all charges act as proof of Subsection 3,

Article XXVII, Section 1, Subsection 4, Guilty, sister Bradley found guilty of having knowledge of others violating the IBEW Constitution, and did not make any attempt to file charges or notify the Local Union officers.

Article XXVII, Section 1, Subsection 9, Guilty, in meetings to advocate resignation her dissatisfaction caused dissention among other union members,

Article XXVII, Section 1, Subsection 21, Guilty, sister Bradley prior to her resignation of August 2, 1974 she was working in the behalf of the company, knowing IBEW Local 1969 was at that time in difficulty with Precision Plastics.

The penalty is as follows:

Based on facts presented Stella Bradley was assessed $500.00 dollars.

Sister Bradley will be notified by mail of decision of the Trial Board.

Trial Board meeting adjourned at 7:30 P.M.

Respectfully submitted

Mary J. Faulkner
Recording Secretary

Supreme Court, U.S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1457

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO LOCAL 1969, et al.,
Petitioners,

VS.

REBECCA BISE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

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In the Supreme Court

OF THE

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OCTOBER TERM, 1979

No. 79-1457

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO LOCAL 1969, et al.,
Petitioners,

VS.

REBECCA BISE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF IN OPPOSITION

JURISDICTION

Petitioners' references to the opinions below and to the jurisdiction of this Court on a Petition for Certiorari are correctly set forth.

QUESTIONS PRESENTED

The "questions presented" as stated by Petitioners are incorrect. The questions presented by this case are:

1. Are punitive damages appropriate for violations of rights protected under the Labor Management Reporting

and Disclosure Act (LMRDA) where the conduct of the union is egregious.

2. May a Court review a union's improper intent and motive for disciplining its members.

3. Is the Requirement of Exhaustion of union remedies within the discretion of the District Court.

4. Is there sufficient evidence to support the jury's award of damages.

STATEMENT OF THE CASE

The Petitioners have incompletely stated the case in their Petition for Writ of Certiorari. Therefore, Respondents submit their statement of the case.

Respondents brought this action on January 8, 1975, following the improper imposition of discipline by Petitioners for the exercise of rights protected under the LMRDA.

A. Conduct of Respondents

Respondent Wil Klatt, as a foreman at Precision Plastics, was concerned about whether or not a foreman could work during the upcoming strike (RT. 247,248).[1] Klatt, along with Respondent Bise, who lives with Klatt (RT. 291), went to the National Labor Relations Board (NLRB) and was there informed of being able to resign and return to work without being punished by the union (RT. 248). Respondents Klatt, Bise, Lee Ornellas and Fran Kaona would often gather at Kaona's home during the strike, to

[1]RT. references herein refer to the Reporter's Transcript of the proceedings at trial and are part of the record on file with the Court of Appeal.

pool money for food, socialize, dance, play cards (RT. 296-297) and they would discuss the strike (RT. 249). Klatt informed others of the information obtained from the NLRB (RT. 249).

During one such gathering Rachel Buser, a union member, came to Kaona's home with Richard Pino. They were not invited, but went on a friendly basis. It was Buser and Pino who brought up the topic of arbitration, the strike and Klatt's consideration of resigning and returning to work (RT. 726, 727). Kaona (RT. 333), Bise (RT. 297) and Klatt (RT. 252) were present that night, but Ornellas was not (RT. 361). At no time did either Klatt, Bise or Kaona try to persuade Buser to cross the picket line (RT. 726).

Following a July 31, 1974 union meeting at the Royal Inn Hotel, Bise, Kaona, Klatt, Ornellas, Maxine "Chris" Stones and some other people gathered around the Stones' truck (R.T. 251,299). Respondent Claude Stones did not attend that meeting; he sat in their pickup truck in the parking lot (R.T. 131). There were some expressions of dissatisfaction with the union, with the continuation of the strike, and a desire to return to work (R.T. 298,252,336,337). Maxine Stones had not had any contact or discussions with, either by phone or in person (R.T. 131) nor had she seen, any of the other respondents except at union meetings (RT. 133) before the gathering around her truck. Respondents Stella Bradley (RT. 418) and Vicky Pappas (RT. 683) had not gathered around the truck, nor had Dan Carr.

When these people dispersed, Maxine and Claude Stones went home (RT. 134) and Bise, along with Kaona, Klatt

and Ornellas went to Precision Plastics to pick up her vacation check. Kaona, Klatt and Ornellas were in Bise's auto because they had all driven to the union meeting together (RT. 300,301). Bise had permission from Petitioner Elsie Smith to pick up her vacation check (RT. 301,302,335).[2] There were no pickets walking up and down with picket signs when these four Respondents entered Precision Plastics (RT. 771,313). Klatt went in the plant to tell his supervisor that he was going to resign and return to work (RT. 258). Bise indicated to the secretary, Olga, that she was dissatisfied with the strike and that she would probably be to work Monday (RT. 302,303). Kaona told Roger Houle, the plant manager, that she was dissatisfied with the strike continuing and that she would like to return to work (RT. 337,338). Ornellas didn't say anything about resigning and returning to work, she just exchanged "hellos" (RT. 364,365). Ornellas and Bise did not decide to resign until the next day, August 1, 1974 (RT. 365,296). After leaving the plant, these Respondents went home (RT. 339).

On August 1, 1974, Bise, Kaona, Klatt and Ornellas each typed their own letters of resignation on Kaona's typewriter (RT. 340,258,304,365).

On August 1, 1974, Klatt called Respondent Stella Bradley because she had indicated, through her actions during the July 31, 1974 union meeting, that she was dissatisfied with the strike. Klatt asked Bradley if she wanted to return to work and she indicated that she did. Klatt told

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[2]Petitioners' assertion to the contrary in footnote 4 of the Petition is not accurate.

her about the information received concerning the permissibility of returning to work and a copy of a resignation letter was offered (RT. 264,265). This was the only conversation Bradley had with any of the Respondents until she returned to work (RT. 413,414).

On August 2, 1974, Maxine Stones called and told Klatt that she was going to go back to work. Klatt was noncommittal and evasive (RT. 135,165). Stones indicated she was going to resign but didn't know how to word a letter of resignation at which point Klatt offered to give her a copy of the letter (RT. 260). Stones asked to have a copy typed and one was typed by Bise (RT. 260,261) who had also typed a copy for Bradley (RT. 304).

On August 2, 1974, the resignation letters of Bise, Klatt, Ornellas, Kaona and Maxine Stones were mailed by Bise and Kaona (RT. 307). Each returned to work on August 5, 1974 (RT. 307,341,261,367,138). Stella Bradley mailed her letter of resignation on August 3 and returned to work on August 5 (RT. 416).

Rebecca Bise never tried to talk anyone else into resigning and returning to work (RT. 229,313).

Fran Kaona never tried to persuade or talk any other people into resigning from the union and she made up her mind on her own (RT. 346).

Will Klatt did not attempt to convince or talk anyone into resigning and returning to work (RT. 265).

Lee Ornellas did not try to persuade or talk anyone else into resigning and returning to work (RT. 363,370).

Maxine Stones had no contact or discussions, either by phone or in person, with any other Respondent before the July 31st union meeting, nor had she even seen any of them except perhaps at a union meeting (RT. 131,133).

Respondent Dan Carr never met with or had any discussions with any of the other Respondents (RT. 391,392). On one occasion he spoke to Bise by phone and asked about resigning and returning to work without being punished by the union. Bise did not answer him, instead she referred him to the NLRB (RT. 393). That was the only contact he had with any other Respondent during the strike (RT. 392). During the strike, Dan Carr had gone to the home of Tony McCarthy with three other people to talk to him about why he was working during the strike (RT. 338). Because of that, Mr. Appleblom, President of Precision Plastics pressed charges against Carr and brought them to Carr's home (RT. 338,389). While he was there, Carr asked Mr. Appleblom if there was a job for Myra Timberlake, Carr's girlfrined (RT. 390). Carr resigned on August 6, 1974, stating in his letter "TO WHOM IT MAY CONCERN, I quit the Local 1969 IBEW Union as of 8-6-74" (RT. 395). He then called Precision Plastics to inform them of his resignation and return to work, and he asked if there was a job for his friend, Ernie Mokel (RT. 395,396). Carr returned to work August 7, 1974 (RT. 396).

Respondent Clause Stones was not permitted to attend the union meeting before the strike began (RT. 190). He was told to leave by Petitioner Elsie Smith (RT 190). Smith, during a union meeting, referring to Claude and Maxine "Chris" Stones, threatened that "We'll get them

this time" (RT. 676,677). Claude Stones took a withdrawal card from the union and continued to work (RT. 193). Stones did not meet secretly with the company president.[3]

Vicky Pappas never met with, had any contact with, or saw any of the other Respondents during the strike (RT. 680). On August 9, 1974, Pappas called Precision Plastics to find out how she could return to work (RT. 681); she was told to wait a moment, then Klatt came to the phone. She did not know Will was working there. She asked Klatt, "I would like to come back to work. What do I do?" and Klatt said, "Write a letter of resignation." Nothing else was said and she hung up (RT. 706,707). Pappas prepared her own letter of resignation[4] on August 10 and returned to work on August 12 (RT. 707). Respondent Victoria Pappas did not negotiate her return to work with the company president.[4]

B. Conduct of Petitioners

Promptly upon the resignation of each Respondent, Petitioner Elsie Smith, a business representative for Petitioner IBEW, filed charges against them alleging violations of the union constitution for resigning and returning to work (RT. 642,643). Smith filed these charges to "show the other members that the union cared" (RT. 643). Smith testified that when charging these Respondents, she differentiated between them because of their varying conduct

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[3]Petitioners' assertion to the contrary in footnote 2 of the Petition is not accurate.

[4]Petitioners' assertion to the contrary on page 6 of the Petition is not accurate.

(RT. 635). However, each Respondent who resigned was charged identically with having violated the same sections of the same article of the union constitution (RT. 636,637).

Not until the strike was over did Smith drop her charges on advice of counsel (RT. 778).

Upon the conclusion of the strike, Respondents were directed to immediately rejoin the union which they did.

Almost immediately thereafter on September 5, 1974, Petitioner Richard Cripe, Assistant Business Manager of Petitioner IBEW, filed his charges against Respondents. Cripe did not, nor would he, investigate before filing any charges even if they were based on rumor and inference (RT. 462). He would not investigate any kind of charge regardless of what he heard or did not hear (RT. 461). Cripe would not, under any circumstance, ever check into the basis for any charge that he would file (RT. 462). Cripe did not investigate these charges before he filed them (RT. 459,460). Cripe had the time to contact each Respondent and could have contacted them, but did not (RT. 463,464). Cripe based charges on rumors (RT. 473,498,545,600). Cripe charged Respondents for attending a meeting about which he knew nothing; he did not know where or when it was held (RT. 538); he did not know who was there (RT. 541); he did not have any idea at all what was discussed (RT. 544); nor did he know what was accomplished (RT. 543).

Cripe testified that the following are not violations of the Petitioner union's constitution: expressing dissatisfaction (RT. 491), resignation (RT. 487), asking for a copy of the resignation letter (RT. 491,492), talking about withdrawal or talking someone into it (RT. 565,566), using the

same typewriter and paper (RT. 578), typing someone else's resignation letter (RT. 579); talking about resigning and returning to work (RT. 487,486), telling someone of the legality of resigning and returning to work (RT. 553), asking someone if they are going to resign (RT. 554), asking someone to resign and return to work with you (RT. 554), mailing someone else's resignation letter (RT. 580).

Cripe knew that the union would impose fines against Respondents in order to make an example out of these people, to show them that if they did this again they would be subject to the same charges and fines and to impress on them that they could not do what they did and get away with it (RT. 588).

Each Repondent was found guilty of all charges except Maxine Stones who was found guilty of all but one of the charges. Each Respondent was punished by the union (Appendix J).

On October 23, 1974, the Petitioner union sent letters to both the International Vice President and the International Secretary of the International Brotherhood of Electrical Workers Union which included:

> Copies of charges filed against employees of Precision Plastics Company for going through a recognized picket line (CR. 910 & 911, Resp. Exhs. 22 & 23, RT. 447,449*).

Following the union's determination of guilt and assessment of fines, each Respondent was threatened, in writing, that the union would take the matter to Court in order to

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*CR. references herein refer to the Clerks Record of the proceedings at trial and are part of the record on file with the Court of Appeal.

enforce payment. One such lawsuit was filed by the Petitioners against Respondent Claude Stones.

ARGUMENT

I

EVERY CIRCUIT TO CONSIDER THE QUESTION HAS HELD THAT THE AWARD OF PUNITIVE DAMAGES IS APPROPRIATE RELIEF WHERE EGREGIOUS UNION CONDUCT HAS BEEN DEMONSTRATED

Mr. Justice Blackmun, in the concurring Opinion in *IBEW v. Foust*, ... U.S. ....., 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979) while discussing punitive damages awards in suits brought by workers against unions under the Landrum-Griffin Act points out, "Every circuit to consider the question has held that punitive damages are 'appropriate relief' when a union's conduct manifests 'actual malice or reckless or wanton indifference' to members' speech and associational rights. *Boilermakers v. Braswell,* 388 F.2d 193, 199-201 (CA5), *cert. denied,* 391 U.S. 935 (1968); *Cooke v. Orange Belt Dist. Council,* 529 F.2d 851, 820 (CA 9 1976); *Morrissey v. National Maritime Union,* 544 F.2d 19, 24-25 (CA2 1976); *Keene v. IUOE Local 624,* 569 F.2d 1375, 1381-1382, and n. 8 (CA5 1978). These courts noted that punitive damages would serve a legitimate deterrent purpose in appropriate cases. *Braswell,* 388 F.2d at 200; *Cooke,* 529 F.2d at 820."[5]

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[5]The stance adopted by the Sixth Circuit in *McCraw v. United Ass'n of Journeyman* 341 F.2d 705 (1968) has been cited for the proposition that punitive damages are not appropriate in the LMRDA context. (See *Murphy v. Operating Engineers, Local 18,* ..... F.Supp. ....., 99 LRRM 2041 (N.D. Ohio 1978).) Such reliance is misplaced. The question of punitive damages was not before

Petitioners argue that this Court's decision in *Foust* (supra) has limited the potential for recovery of punitive damages in the labor context.[6] The *Foust* decision is inapposite to the instant case.

The case herein clearly and solely arose from the violations by the Petitioners of the rights and protections afforded the Respondents by the LMRDA. The case is not one involving an unfair labor practice of the type that prompted the *Foust* litigation as Petitioners have urged. In *Foust,* this Court considered the issue of whether the Railway Labor Act permitted recovery of punitive damages from a union for breach of its duty of fair representation by its failure to process a member's wrongful discharge grievance. This Court specifically limited its holding to such suits and in so doing expressed "no view on the propriety of punitive awards in suits under the Landrum-Griffin Act [and concerned itself] . . . with judicially created remedies for a judicially implied cause of action." (Footnote 9, *IBEW v. Foust,* (supra).

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the *McCraw* court. The plaintiff in *McCraw* sought actual damages for personal injuries and economic loss and it was from their denial that he appealed.

> "With respect to his claim for damages, McCraw complains of the ruling of the District Judge that since the lawsuit was founded upon a violation of Section 411(a), Title 29 United States Code, and was brought pursuant to Sections 411(a) and 412, it was not a common law action for damages and damages would be limited to these which directly and proximately resulted from the alleged violation of the Act. *McCraw* (supra at 710)

In concurring with the District Court, the Sixth Circuit can hardly be said to have decided the availability of punitive damages pursuant to 29 U.S.C. § 412.

[6]Petition, pg. 12.

The Court points out that even though there is a clear statutory duty of fair representation,[7] the right to bring unfair representation suits is judicially implied. Congress did not specify what kinds of remedies are available in fair representation suits. That being so, the Court felt compelled to "implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace."

The Court decided that an award of punitive damages did not comport with that policy goal. In support of this decision the Court, citing its decision in *Vaca v. Sipes,* 386 U.S. 171 (1967), reasoned that although the purpose of fair representation suits is to compensate for injuries caused by violations of employees' rights, in the ordinary case the bulk of the damages are attributable to employer conduct. That being so, the burden of paying damages should be shifted to the party best able to bear the burden, the employer, not the union, with its limited treasury.

This fee shifting rationale might be apposite in a fair representation suit but it is patently inappropriate in the LMRDA context with its clearly mandated right to sue and its clear statement as to the propriety of damage awards.[8]

Mr. Justice Blackmun, joined by The Chief Justice, Mr. Justice Rehnquist, and Mr. Justice Stevens concurred in

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[7] *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944).

[8] § 102 of the Act (29 U.S.C. 412) permits suits "for such relief including injunctions as may be appropriate." this statutory language, in itself, allows for a broad scope of relief.

the result but wisely questioned the correctness and wisdom of the majority's promulgation of a *Per Se* rule, "that a union's breach of its duty of fair representation can never render it liable for punitive damages, no matter how egregious its breach may be."

Mr. Justice Blackmun and the concurring minority agree the "Court of Appeal's unanimous refusal to erect a *per se* bar to punitive damages against unions, both in unfair representation cases and in Landrum-Griffin cases, seems judicious. If a union's conduct should reveal intentional racial discrimination, deliberate personal animus, or conscious infringement of speech and associational freedoms, [We] can discern no principle of federal labor policy that stands in the way of a punitive award."

Petitioners argue that the legislative history of the LMRDA be considered. Respondents are in accord with this proposition but object to statements in the history being taken out of context and given unjustified interpretation. Petitioners quote Senator Morse's comments in opposition to the original draft of the Landrum-Griffin bill.[9] Senator Morse's comment was prophetically quite correct as, pursuant to the LMRDA as finally adopted, union members may undoubtedly sue union officers.[10] However, Petitioners' statement to the contrary notwithstanding, his comments made no reference, whatever, to recovery of punitive damages. It would be strange, therefore, for his colleagues to reply that punitive damages were not recoverable. Despite Petitioners' assertion that such a reply was

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[9]Petition, pg. 13, 14.

[10]29 U.S.C. §§ 412, 529.

made, no reference to where such reply may be found is given, and after searching the legislative history, Respondents have found none. Petitioners unsupported statement that the Sponsors of the LMRDA opposed the recovery of punitive damages under the Act is, in view of the gravity of proceedings in this forum, inappropriate.[11]

The LMRDA was meant by Congress to provide union members with basic rights and to insure that those rights could be protected. There is no prohibition expressed or implied in the legislative history against exemplary damages to insure enforcement of these rights. To the contrary, every indication is given that Congress wanted these rights enforced and violations prevented through the means available within the judicial process and in a forceful manner.

The Honorable Phil M. Landrum, a co-sponsor of the substitute bill which ultimately became the LMRDA declared that;

> "Again, in the words of the senior Senator from Arkansas, the distinguished John McClelland:
>
> > 'I say with all the force at my command, the substitute bill is not designed to penalize that which is good, but only to prevent that which is evil.'
>
> It is not designed to penalize that which is good. It is only to prevent that which is evil. That is what the substitute bill does. That is the only punitive part about it that I can find, if it is punitive, it is to stop that which is evil and help that which is good."
>
> Legislative History of the LMRDA of 1959, Vol. II, p. 1557, col. 1.

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[11]One of the cases cited by Petitioners allegedly regarding legislative intent of the sponsors, predates the LMRDA by approximately 9 years.

Representative Bailey of West Virginia, even in strenuously opposing the Landrum-Griffin substitute in favor of a weaker committee bill, expressed the sense of the Congress by declaring that;

> "what we seek to do here today is to punish only the guilty."

(Legislative History, supra, Vol. II, p. 1620)

The Honorable Robert P. Griffin, also a co-sponsor of the legislation which became the LMRDA, declared that;

> "The Landrum-Griffin substitute on the contrary provides the bill of rights teeth. . ."
>
> (Legislative History, supra, Vol. II, pp. 1544; 1566)

Representative Cramer of Florida expressed the feelings of his colleagues:

> "The Landrum-Griffin bill, which passed the House of Representatives by the overwhelming vote of 303 to 125 guarantees many basic rights to union members and backs up these rights with civil and criminal penalties."
>
> (Legislative History, supra, Vol. II, p. 1709)

Representative Thompson of Wyoming cautioned his colleagues:

> "we must be really careful that we do not give rights to union members in big print and take them away in fine print, as the saying goes."
>
> (Legislative History, supra, Vol. II, p. 1544)

Petitioners' emphasis on statements contained in the Legislative History of the LMRDA that the legislation is "not punitive" is misplaced in the context of the issue involved in this litigation. The issue here regarding "punitive" is what remedies are available for violations of

LMRDA rights, whereas the issue before Congress was what rights to provide and what controls to place on unions. Representative Bosch of New York, in support of the Landrum-Griffin bill, expressed the view that the use of the term "punitive" was a slogan.[12]

Representative Griffin was also aware of the problem with slogans and labels.[13]

The jury below found the requisite malice and reckless or wanton indifference required by each of the circuits and assessed appropriate punitive damages. The jury found, in response to special interrogatories submitted to them, that each Respondent was disciplined by the Petitioner IBEW for engaging in conduct protected by the Act and that as to each Respondent except Claude Stones, all three Petitioners acted "maliciously, oppressively, and in bad faith." (CR. pp. 996-1006).

The clear evidence below was that none of the Respondents were charged with any violations until each had

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[12]"The current slogan used by union leaders—and even some Members of this House—is that any effective labor reform bill is a punitive bill. What do they mean by punitive? Isn't this just another smokescreen by using an adjective, for all we know that a punitive bill is simply a bill that means what it says—it is simply a bill without the gimmicks and loopholes . . . But, Mr. Chairman, the Griffin-Landrum (sic) bill is only punitive with respect to those engaged in the abuses that it is designed to stop . . . What are some of the other so-called punitive provisions of the Griffin-Landrum (sic) bill? It would give union members the right . . . to sue a union." (Legislative History, supra, Vol. II, pp. 1615-1616.)

[13]"In general, the press coverage that has been accorded our substitute bill has been fair, accurate and objective. However, as might be expected, in some quarters the bill was quickly tagged as 'extreme', 'vicious' and 'antilabor'. Whether we like it or not, apparently a battle of tags and labels is on." (Legislative History, supra, Vol. II, p. 1534.)

resigned and returned to work. Promptly upon resignation, charges were filed against the Respondents alleging a violation of the union constitution for resigning and returning to work.[14] Resigning from a union and returning to work is permissible without fear of union retribution.[15] Resigning and returning to work is not a violation of any provision in the IBEW Constitution.

Petitioners, realizing that they could not punish Respondents directly for resigning and returning to work attempted to accomplish the same purpose by disciplining them through Cripes' charges. Their problem is that the alleged conduct supporting those charges is protected by the LMRDA Bill of Rights, and in some instances did not exist.[16]

Petitioners have maintained throughout the proceedings below that Respondents were not punished for resigning and returning to work. It would appear that, before this Court, Petitioners are adopting a different position in order to make an argument under the NLRA.[17]

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[14]Respondents Exhs. 13A-20A which were admitted into Evidence (CR. 869).

[15]*NLRB v. Allis-Chalmers Mfg. Co.* 388 U.S. 1975 (1967); *NLRB v. Granite State Jt. Bd. Textile Whrs. U. Local 1029*, 409 U.S. 213 (1972); *Booster Lodge No. 405, Int'l Assn. of Machinists v. NLRB*, 412 U.S. 84 (1973).

[16]Dan Carr was disciplined for attempting to persuade Frank Talavera to cross the picket line (CR. 137). Frank Talavera testified at trial that this was not true (RT. 762).

Claude Stones was charged with informing other Respondents "as to how they might find out how to resign from the union and encouraging them to do so." (CR. 146, ln. 30; 147, ln. 1). There is no evidence because it was not so. (RT. 197).

[17]Petition, p. 16.

The majority in *Foust,* (supra), realized that there is a delicate balance that must be maintained between individual and collective interests in the labor context. In the fair representation area this Court, quoting itself from *Vaca v. Sipes,* (supra), says, "the fair representation doctrines thus serves as a bulwark to prevent arbitary union conduct against individuals stripped of traditional forms of redress by the provisions of FEDERAL LABOR LAW." It seems appropriate to borrow this reasoning for use in an LMRDA context. This Court based its decision in *Foust,* partly on the rationale that in fair representation suits often the employer may appropriately bear the damage burden because the union's damaging conduct usually has consisted of a failure to process a grievance, not of initially perpetrating the damaging injury.

In the LMRDA context, where else may the aggrieved union member look but to the union. The LMRDA was created to redress union infringement on union members' due process, free speech and free assembly rights. As indicated previously herein, conduct such as was engaged in by the Petitioners impels the award of punitive damages. The intent and purpose of the LMRDA was to allow such damages. Without this Court's protection of the rights granted, the act would be rendered moot. If the award of punitive damages in appropriate cases were to be banned, it is the union members who would be punished by the inevitable loss of the rights granted by the LMRDA.

Petitioners also question whether compensatory and punitive damages are allowable to the union members under

the LMRDA where there is no evidence of consequential damage.[18] The Court of Appeals herein already disposed of this question by its citation in *its opinion,* of *Gill v. Manuel,* 488 F.2d 799, 802 (9th Cir. 1973), a deprivation of Civil rights suit under color of law, which states:

> "It should also be noted that an award of compensatory damages is not a necessary prerequisite to an award of punitive damages. See *Basista v. Weir,* 340 F.2d 74, 88 (3rd Cir. 1965)." 488 F.2d 799 (1973)

The Court of Appeals did, in fact, reverse the compensatory damages as to some of the Respondents but left their punitive damages intact, saying, "All plaintiffs established their *rights* to compensatory damages. Some of them failed to prove any such damages . . . Nevertheless, punitive damages are permissible to vindicate the invasion of those protected rights and as a deterrence against future violations by overzealous unions and their officers."[19] (emphasis in original) The Court of Appeals also found that as to Respondents Bise, Pappas, Maxine Stones and Kaona, there was evidence of consequential damage. (Appendix A-9).

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[18]Petition, pg. 3.

[19]Court of Appeals Opinion, Appendix A-10.

II

THE STANDARD OF REVIEW OF UNION TRIAL BOARD DECISIONS IS BROADENED WHERE DISCIPLINE HAS BEEN IMPOSED FOR IMPROPER PURPOSES

Petitioners would agree that they lacked power to discipline non-members and former members.[20] That is so; in *NLRB v. Granite State Jt. Bd. Textile Whrs. U. Local 1029,* 409 U.S. 213 (1972) this Court was faced with a factual situation very similar to the instant case. In that case the court held that it was an unfair labor practice within the terms of the National Labor Relations Act (29 U.S.C. § 157, 158(b)(1)) for the union to fine employees who had been union members in good standing but who had resigned during a lawful strike and thereafter returned to work during the strike. The Court, in so doing, said:

> "Yet when a member lawfully resigns from the union, its power over him ends . . . [cite omitted] if a union rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, . . . Under [§ 157] of the Act the employees have 'the right to refrain from any or all' concerted activities relating to collective bargaining or mutual aid and protection, as well as the right to join a union and participate in those concerted activities . . . We have, therefore, only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations, as he sees fit."

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[20]Petition, p. 16.

In *Booster Lodge No. 405, Int'l Assn. of Machinists v. NLRB,* 412 U.S. 84 (1973), the Court expanded its holding in *Granite State,* (supra) by a finding that union members are free to resign and return to work during a strike even though the union constitution expressly prohibits such conduct. The Court of Appeals relied on *Granite State,* (supra) and *Booster Lodge* (supra) in affirming the trial court judgment and identified the issue presented to the trial court as one of determining the Petitioners' intents and motives for disciplining the Respondents. The Court pointed out that there was substantial evidence in the record that it was the Respondents' post-resignation return to work that prompted the fines; that the charges filed against Respondents were for pre-resignation conduct clearly within the protection of the LMRDA; and that the jury could have reasonably arrived at the conclusion that it was the union's purpose to punish the Respondents for resigning and returning to work.[21]

The Petitioners argue that the Court of Appeals erred in its review of the Petitioners' trial board decisions; that the responsibility of the court was to determine that there was some evidence supporting Petitioners' trial board decisions. The Petitioners rely on *International Brotherhood of Boilermakers v. Hardeman,* 401 U.S. 233 (1971) to support their argument.[22] The Court of Appeals indicated that Petitioners' reliance on *Hardeman* was misplaced:

> "Unlike the question presented in *Hardeman,* the infirmity is not in the procedure used or the method of discipline, but in the fact that the discipline is being

[21]Court of Appeals Opinion, Appendix A-6 and 7.
[22]Petition, pg. 18, 19.

> imposed for an improper purpose. To adopt the Union's reading of *Hardeman* would have the effect of 'insulat[ing] any Union discipline of a member, so long as the charges brought against him are supported by 'some evidence', no matter how insubstantial or suspicious that evidence might be.' [cite omitted] We will not adopt such a reading."[23]

The Court followed the reasoning of the Second Circuit as presented in *NLRB v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America*, 479 F.2d 57 (2d Cir., 1972), that the clear import of the *Hardeman* (supra) decision is not that "some evidence" to support the charge will preclude Board or judicial review, but rather, that unless some evidence is presented by the charging party against the accused member, the union will be held to have violated the due process requirement implicit in Section 101(a)(5)(C) of the Act. [The court added that] "while we must respect the congressional judgment of judicial noninterference in the internal affairs of unions, we must also not forget the special need to protect individual members against the danger of overreaching by entrenched union leadership."[24]

The Respondents have consistently cited *Hardeman* (supra) in their arguments below centering around their due process claims in accord with the reasoning of the Court in *NLRB v. Local 294* (supra).

Other courts have held that the alleged limited scope of judicial review, as presented in *Hardeman* (supra), is

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[23]Court of Appeals Opinion, footnote 5.

[24]Court of Appeals Opinion, footnote 5.

altered when § 411(a)(2) free speech and assembly rights are involved.

In *Pearl v. Tarantola*, 361 F.Supp. 288 (S.D. N.Y. 1973), for example, the district court discussed the alleged limitations, as follows:

> In *Boilermakers v. Hardeman* [cite omitted], an action based on alleged wrongful expulsion from a union, the Supreme Court held that the district court was not empowered by § *411(a)(5)* of the LMRDA to interpret union regulations in order to determine the scope of offenses warranting discipline of union members. The general posture of a court reviewing a union's determination is thus limited to a determination whether there was sufficient evidence to support the findings of the union. However, when exercise of free speech and assembly are involved, the scope of review is somewhat different. As the 3rd Circuit in *Semancik v. United Mine Workers of America Dist. #5*, 466 F.2d 144 (3rd Cir. 1972) recently held:
>
> > 'While it is beyond the province of the court to scrutinize whether unions may punish members for particular behavior, (citations omitted), the same prohibitions do not apply to actions involving free speech, the cornerstone of all union democracy.' 466 F.2d at 153.
>
> Thus, this Court must scrutinize the alleged First Amendment behavior sought to be punished by the Union, to see if such punishment comports with the First Amendment and its statutory embodiment, § 411(a)(2) of the L.M.R.D.A."

The Petitioners, as they have done repeatedly throughout this action, state incidents of alleged conduct of Respondents that is allegedly unprotected. The incidents are

couched in the most sinister terms. In reality when the statements of alleged conduct are scrutinized it becomes obvious that even the most sinister of the allegations are descriptive of protected conduct. The jury below so found; the Court of Appeals, in affirming, held that the jury's finding of a violation of Respondents' rights of freedom of speech and assembly was sufficiently grounded in the evidence. Furthermore, in so doing, they did not, in any way, alter the standard of review set forth in *Hardeman* (supra).

III

THE ASSESSMENT OF THE APPROPRIATENESS OF EXHAUSTION OF INTERNAL UNION APPEAL PROCESSES IS WITHIN THE SOUND DISCRETION OF A DISTRICT COURT

The Court of Appeals has made it clear that it is within the sound discretion of the courts to decide whether exhaustion of internal union remedies will be required in any given case.[25] The Petitioners are in accord.[26]

That the language of the statute regarding exhaustion is not mandatory, also speaks very clearly as to the intent of Congress.[27]

The District Court below found that exhaustion was not required, in its ruling on cross-summary judgment motions.[28] The court reiterated this finding in its opinion,[29]

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[25]Court of Appeals Opinion, Appendix A-4 and 5.
[26]Petition, pg. 20.
[27]29 U.S.C. 411(a)(4) (Appendix I).
[28]Reporter's Transcript, January 9, 1976, Appendix E-2 and 3.
[29]District Court Opinion, Appendix H-2 and 4.

basing its decision on the 9th Circuit's holding in *Ross v. IBEW*, 544 F.2d 1022 (9th Cir. 1976). In *Ross v.* IBEW (supra), the main issue considered by the court was IBEW's constitutional prohibition of filing suit against the union without first making use of the internal appeal processes for four months. The court said:

> "It has been established that it is a court, not the union itself, which may require the exhaustion of 'reasonable hearing procedures' for up to four months as mentioned in the statute."

The Court of Appeals reasoned that while the exhaustion principle is calculated to foster union self-regulation, that where, as here, improperly disciplined members raise issues in the public domain, such as violation of First Amendment rights, the courts should not delay consideration pending exhaustion, and further, that where such rights are involved, it is within the sound discretion of a trial court to determine whether a union's internal procedures may be adequate.[30]

The Petitioners assertion that the Court of Appeals "failed to provide criteria against which a reasonable review of the Trial Court's discretion could occur",[31] ignores this sound reasoning of the Court of Appeals, and it must be emphasized that the Court hastened to add that "the mere assertion by a union member that his free speech rights have been infringed will not, in all cases, render

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[30]Court of Appeals Opinion, Appendix A-5 and 6.

[31]Petition, pg. 20.

the exhaustion doctrine inapplicable. It is within the sound discretion of the trial court to make this determination."[32] The Court simply found, on review, that the trial court herein had acted well within its discretion in not requiring exhaustion.[33]

Petitioner's assertion that the Respondents herein should have been required to exhaust their intra union appeals because there was no imminent threat of interference with their rights is unsupported by the evidence.[34] Each Respondent had been sent a letter from the union serving notice that the union would take the matter to court if the fines were not paid within ten (10) days. One such letter was sent each to Claude Stones[35] and Stella Bradley.[36] The other Respondents were each sent two such letters, dated November 21, 1974 and December 26, 1974. Each letter indicated, "This is your final notice" and in the last letter sent the word "Final" was underlined.[37] On December 27, 1974, the union filed suit against Claude Stones to collect the fine.[38] Stones was served with that lawsuit.[39] Respondents assert that the interference was imminent and as a result of the threatening letters and the actual filing of suit against Respondent Claude Stones, Respondents were

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[32]Court of Appeals Opinion, Footnote 3, Appendix A-3.

[33]Court of Appeals Opinion, Appendix A-6.

[34]Petition, pg. 20.

[35]RT. 195, Petitioners Exh. 1013-G.

[36]RT. 140, Petitioners Exh. 1006-G.

[37]RT. 131,344,263,369,146, Petitioners Exh. 1005-F&G, 1007 through 1012 F&G.

[38]CR. 292, Respondents Exh. 21-D.

[39]CR. 195, ln. 10-11.

compelled to file suit immediately in the court below seeking an injunction.

Since the early *Detroy v. American Guild of Variety Artists*, 286 F.2d 75 (1961) *cert. denied* 366 U.S. 929 (1961), the various circuits have remained consistent in their holding that the requirement of exhaustion is a question for the trial judge, to be answered by the facts of each individual case.

CONCLUSION

Respondents respectfully submit that the Petition for Writ of Certiorari be denied. The opinion of the Court of Appeals below is well-reasoned and is not indicative or provocative of disagreement among the Circuits and this Court.

Respectfully submitted,

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No. 79-1457

In the Supreme Court of the United States

OCTOBER TERM, 1979

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 1969, ET AL.,
PETITIONERS

v.

REBECCA BISE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether punitive damages may be awarded against a union that, in an effort to protect the effectiveness of an economic strike, assessed fines against members for conduct found to be protected under Title I of the Labor Management Reporting and Disclosure Act of 1959.[1]

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[1] The petition filed in this case also seeks this Court's review of a number of other questions. This brief, however, will address only Question 1.

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The United States submits this brief pursuant to the Court's order of June 2, 1980, inviting the Solicitor General to express the views of the United States.

STATEMENT

This action was brought by respondents, nine members of Local 1969, International Brotherhood of Electrical Workers (the "Union"), against petitioners—the Union and two of its officers—for injunctive relief and damages under Section 102 of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 412. Respondents alleged that the Union had unlawfully disciplined them on account of their exercise of rights protected under Title I of the LMRDA, 29 U.S.C. 411–415.[2]

The contested discipline had its genesis in an economic strike called by the Union on July 15, 1974, at Precision Plastics, Inc., where the respondents were employed. One respondent, Claude Stones, worked throughout the strike. He applied to the Union for a "withdrawal card," which permitted him to assume a temporary inactive status, but he never resigned his membership in the Union (RT 191, 199–200, 775–76).[3]

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[2]Title I of the LMRDA is enforced through private legal actions. Although the Secretary of Labor has no direct responsibility for administering that title, he is responsible for the administration and enforcement of Titles II, III, and IV of the LMRDA, which share with Title I the objective of "afford[ing] necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations." Section 2(b), 29 U.S.C. 401(b).

[3]"RT" refers to the transcript of the district court trial filed in the court of appeals.

The other eight respondents initially honored the strike; but in early August, 1974, each of the eight resigned from the Union and returned to work (RT 138, 261, 307, 341, 366–367, 395–396, 416, 707).

Petitioner Smith, the Union's business representative, then filed charges with the Union against each of the respondents, based in part on their return to work during the strike (RT 629–630, 641–643, 647). Shortly thereafter, on August 16, 1974, the strike was settled, and the eight respondents who had resigned rejoined the Union (RT 143, 262, 309, 343, 397, 687). The charges filed by Smith against the eight who had resigned before returning to work were dropped on advice of counsel (RT 777–778). Subsequently, however, petitioner Cripes, the Union's assistant business representative, filed additional charges against the eight, alleging that their conduct as members during the strike before resigning had violated various provisions of the Union constitution. The conduct said to violate the constitution included a wide range of behavior allegedly engaged in by one or more respondents, including the following: having knowledge that other members were considering resigning from the Union and failing to file charges or notify Union officers (respondents Bradley, Bise, Ornellas, Kaona, Carr, Pappas, and Maxine Stones, RT 816, 818–819; App. J7, J11, J21, J28, J32, J39, J41–J42);[4] meeting together to

[4]"App." references are to the separately bound appendix to the petition. "J." references are to the minutes of the Union trial board proceedings reprinted in "Appendix J" of that appendix. The district judge ruled that the minutes formed a part of the record, to which he would grant a limited evidentiary weight in reviewing the verdict, but he excluded them "from the

discuss or advocate resigning from the Union (Bradley, Klatt, Bise, Ornellas, Kaona, and Maxine Stones, RT 492, 500, 502, 551–554; Pet. App. J11–J33, J41–J43); crossing the Union's picket line without authorization (Klatt, Bise, Ornellas, and Kaona, RT 802–804, 807, 810–812; App. J11–J22, J26–J33); recruiting friends as strikebreakers (Carr, RT 814; App. J36–J39); and working during the strike without resigning (Claude Stones, RT 798–799; App. J2–J3). The charges were presented to the Union trial board, which found each of the respondents guilty[5] and assessed fines against them in amounts ranging from $200 to $1,250 (RT 799–821; App. J).

Thereafter, respondents brought this suit to enjoin petitioners from collecting the fines and to recover compensatory and punitive damages.[6] Respondents alleged that assessment of the fines violated their

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case before the jury" (RT 226–229, 235.) The court apparently reasoned that the minutes constituted untrustworthy hearsay insofar as they purported to provide information as to the actual conduct of respondents during the strike. We cite them here merely to show the conduct with which the Union charged respondents, of which it found them guilty, and for which it intended to discipline them.

[5]With one exception, each of the respondents was found guilty on all charges. Maxine Stones was found not guilty on one of the charges lodged against her: making the Union's business known to persons not entitled to the knowledge (RT 592, 817–818; App. J11)

[6]In the interim, before this suit was filed, respondent Carr had filed an unfair labor practice charge with the National Labor Relations Board, alleging that imposition of the fines violated the National Labor Relations Act, 29 U.S.C. 151 *et seq.* The Regional Director of the NLRB notified Carr that he declined to issue a complaint. The Director stated that his investigation indicated that the fines had been assessed because of

rights of free speech and assembly guaranteed by Section 101(a)(2) of the LMRDA, 29 U.S.C. 411(a)(2), and their right to a procedurally fair hearing guaranteed by Section 101(a)(5), 29 U.S.C. 411(a)(5), and that petitioners had intentionally inflicted mental distress upon them.

The district court granted summary judgment for petitioners on the procedural claims under Section 101(a)(5) (App. E). It submitted the remaining issues to the jury. With respect to the LMRDA claim, the court instructed the jurors that their task was to determine the reason why petitioners had attempted to discipline the respondents (RT 888, 897). Liability would be established if the fines had been assessed either because respondents had (1) returned to work after resigning from the Union, or (2) engaged in protected speech or conduct before resigning (RT 886, 888). The court further advised the jury that the LMRDA grants union members the right to meet together and express any views or opinions, but that disloyal conduct that threatens the very existence of a union as an institution is not protected (RT 885, 887). The jury was instructed that it could award punitive damages against petitioners if it concluded that they had acted "maliciously or oppressively" in assessing the fines (RT 893).

The jury returned a verdict in favor of respondents on the LMRDA claim, and awarded compensatory

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conduct respondents had engaged in while members of the Union, before resigning, and that the fines therefore did not violate the NLRA (Letter of Nov. 19, 1974, from Regional Director Roy O. Hoffman to Daniel Carr).

damages totalling $4,851, and punitive damages totalling $80,000. It found for petitioners on the claim for intentional infliction of mental distress (CR 937–954).[7] On remittitur, the district court reduced the punitive damage award to $20,000 and awarded $20,000 in attorney's fees (App. C; App. H). It also issued a permanent injunction prohibiting petitioner from attempting to collect the fines (App. C3).

The court of appeals affirmed the finding of liability, holding that the record supported the verdict (App. A6–A7). The court vacated the compensatory damage awards in favor of five of the respondents for lack of proof of actual injury, but sustained the punitive damage awards in all respects (App. A8–A11). The court noted this Court's recent decision in *IBEW* v. *Foust*, 442 U.S. 42 (1979), which held that punitive damages may not be awarded against a union for breach of its duty of fair representation, but it stated that *Foust* was "inapposite" (App. A10 n.6).

DISCUSSION

The petition for certiorari filed in this case presents the question whether punitive damages are available against a union for violations of Title I of the LMRDA, 29 U.S.C. 411–415. This Court expressly reserved judgment on the question in *IBEW* v. *Foust*, 442 U.S. 42 (1979), in which it held that a union member may not recover punitive damages in a suit against his union for breach of its duty of fair representation

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[7] "CR" refers to the "clerk's record" of the district court proceedings, filed with the court of appeals.

under the Railway Labor Act, 45 U.S.C. 151 *et seq.* The government's view is that, while punitive damages may be appropriate in some Title I cases, the court below erred in allowing them as a sanction against discipline imposed by a union to protect the effectiveness of an economic strike.[8]

In reserving judgment on the propriety of punitive damages under the LMRDA, the Court in *Foust* observed that the question there concerned the scope of judicially created remedies for a judicially implied cause of action. Resolution of the issue under the LMRDA, on the other hand, would require analysis of the statutory language of Title I and its accompanying legislative history. 442 U.S. at 47 n.9.

Title I of the LMRDA creates a "Bill of Rights" guaranteeing union members certain basic freedoms, including the rights of free speech and assembly, in union affairs. Section 102 of the LMRDA, 29 U.S.C. 412, creates a private right of action for union members and authorizes the courts to grant "such relief (including injunctions) as may be appropriate" for violations of Title I. This Court has declared that "Title I litigation necessarily demands that remedies 'be tailored to fit facts and circumstances admitting of almost infinite variety'" and that Section 102 was therefore designed "as a broad mandate to the courts." *Hall* v. *Cole*, 412 U.S. 1, 11 (1973), quoting *Gartner* v. *Soloner*, 384 F.2d 348, 353 (3d Cir. 1967).

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[8] We refer, of course, only to forms of discipline that, although found to be unlawfully imposed in a particular case, are in themselves legitimate, such as fines or suspension from membership.

Congress did not expressly indicate whether "appropriate" relief includes punitive damages. The legislative history of Section 102[9] is inconclusive at best on the question whether and in what circumstances punitive damages should be allowed.[10] It does,

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[9]The original bill reported from the Senate committee contained no counterpart to the current Title I. On the Senate floor, Senator McClellan offered an amendment to add a "bill of rights," which became Title I. 105 Cong. Rec. 6475–6476 (1959) *reprinted at* II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 1102 (1959) (hereafter "Leg. Hist."). See *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 178–179 (1964). The McClellan amendment contained language substantially similar to that ultimately adopted with respect to relief. It authorized the courts to award "such relief as may be appropriate, including, but without limitation, injunctions" for violations of its provisions. McClellan amendment, Sec. 103, 105 Cong. Rec. 6476 (1959), II Leg. Hist. 1102. It granted exclusive authority for bringing suit to the Secretary of Labor, however. *Ibid.* Subsequently, the Senate adopted a substitute amendment, offered by Senator Kuchel, transferring litigation authority to the individual members. See 105 Cong. Rec. 6693–6694, 6727 (1959), II Leg. Hist. 1220–1221, 1239; *Calhoon* v. *Harvey*, 379 U.S. 134, 144–145 (1964) (Stewart, J., concurring). Each of the major bills considered in the House likewise contained language similar to that ultimately adopted, authorizing "appropriate" relief for violations of Title I. See H.R. 8400, 86th Cong., 1st Sess., Sec. 102 (1959), I Leg. Hist. 631–632; H.R. 8342, 86th Cong., 1st Sess., Sec. 102 (1959), I Leg. Hist. 700–701; H.R. 8490, 86th Cong., 1st Sess., Sec. 102 (1959), I Leg. Hist. 879–880.

[10]As the parties show (Pet. 12–15; Resp. Br. in Opp. 14–16), the legislative history of the LMRDA does contain a number of statements that the legislation is, or is not, "punitive." In context, however, these statements, which are in any event hopelessly at odds, embody merely the speakers' characterizations of the nature of the substantive prohibitions contained in the Act. They are of scant relevance to the issue presented here concerning the proper remedy for violations of those prohibitions.

however, contain "numerous expressions by sponsors and other supporters of the Act indicating that § 102 was intended to afford the courts 'a wide latitude'" to determine what relief is appropriate in particular cases. *Hall* v. *Cole*, *supra*, 412 U.S. at 13.

Nevertheless, we submit that the court below erred in permitting an award of punitive damages against the Union in the context of an economic strike. In our view, although punitive damages may be permissible in some Title I suits, they are not an "appropriate" sanction under Section 102 against discipline imposed by a union to protect its strategic actions as a collective bargaining representative in its dealings with the employer whose employees it represents. Accordingly, punitive damages should not be permitted under Section 102 with respect to discipline imposed by a union to protect the effectiveness of its economic weapons during a labor dispute with an employer. This result follows from this Court's reasoning in *Foust*.

In *Foust*, this Court was required to determine whether the availability of punitive damages for a breach of the duty of fair representation would effectuate the purposes of the Railway Labor Act, which are "to facilitate collective bargaining and to achieve industrial peace." 442 U.S. at 47. Acknowledging that the prospect of punitive awards would serve to deter union misconduct, the Court concluded that this potential benefit was offset by inconsistencies between punitive damages and the statutory policies in other respects.

The Court reasoned, first, that the fundamental purpose of a fair representation suit is to make the in-

jured employee whole, and that punitive damages—by definition awards that exceed actual loss—are not necessary to that purpose. *Id.* at 48–50. Second, punitive awards could jeopardize the financial stability of unions, on whose well-being the employees' interests and the statutory policy of collective bargaining depend. *Id.* at 50–51. Third, the threat of punitive damages could chill a union's legitimate exercise of its discretion in processing employee grievances, encouraging it to press even frivolous claims. *Id.* at 51–52. Finally, punitive damages are unavailable in unfair labor practice cases arising under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and in secondary boycott damage actions under Section 303 of the Labor Management Relations Act, 29 U.S.C. 187. The "general labor policy" embodied in the Railway Labor Act, as in these other labor-management relations statutes, the Court observed, "disfavors punishment." 442 U.S. at 52.

That same general labor policy dictates that punitive damages not be available in the circumstances here. Again, employees can be made whole by compensatory damages. And, while deterring illegal union activity is unquestionably desirable, the same problems exist here as in *Foust*. The risk of "endangering the financial stability" of unions through punitive damage awards is considerable (442 U.S. at 50); for, as this Court noted in *Foust*, punitive damages are, in effect, "'private fines'" assessed by juries "'in wholly unpredictable amounts bearing no necessary relation to the actual harm caused,'" in order to punish or deter reprehensible conduct. *Id.* at 48, 51 n.14, quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Espe-

cially in light of these considerations, permitting punitive damages to be imposed on unions in circumstances such as those here would exert a chilling effect on legitimate union activity, deterring unions, as the Court expressed it in *Foust* (442 U.S. at 52), "from taking actions clearly in the interest of union members." Such an effect would endanger the delicate balance between statutorily recognized interests of labor and management of which this Court has been especially solicitous.

While it is true that even speech or conduct by individual members that undermines a union's bargaining position during a dispute with an employer may come within the protection of Title I of the LMRDA, it is also the case that the line between protected conduct and unprotected conduct is not always clear. Thus, if threatened with the possibility of punitive damages for guessing wrong on whether discipline may be imposed, unions would be forced, in some circumstances to forego taking lawful measures that would serve the interests of the membership as a whole.

The present case illustrates the point well. Union discipline of employees for conduct during a strike is generally regulated under the National Labor Relations Act by the National Labor Relations Board, the expert body chosen by Congress to oversee labor-management relations. Specifically, the Board enforces Section 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A), which prohibits a union from restraining or coercing employees in the exercise of their rights, *inter alia*, to refrain from engaging in concerted activities, but which also provides that a union's right

"to prescribe its own rules with respect to the acquisition or retention of membership" shall not be impaired by the section. The Board, sustained by this Court, has drawn a careful line between union discipline for conduct—including strikebreaking activities—engaged in by employees after they have resigned from their union and union discipline for the same conduct engaged in prior to resignation. Compare *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967), with *Booster Lodge No. 405, IAM* v. *NLRB*, 412 U.S. 84 (1973), and *NLRB* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029*, 409 U.S. 213 (1972). Generally, discipline for post-resignation conduct, but not reasonable discipline for pre-resignation conduct, is held to be an unfair labor practice. The distinction recognizes, on the one hand, that "'[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent'" (*Allis-Chalmers, supra*, 388 U.S. at 181) and, on the other, that "when a member lawfully resigns from the union its power over him ends" (*Granite State, supra*, 409 U.S. at 215).

The court below assumed, and the parties apparently agreed (App. A6–A7), that resignation of union membership and post-resignation strikebreaking activities are conduct protected under Title I of the LMRDA.[11] Whether union discipline for such conduct is considered as a possible unfair labor practice under

[11] We take no position on the question whether the acts of resigning union membership and thereafter working during a strike come within the Title I protection for "[f]reedom of speech and assembly" (29 U.S.C. 411(a)(2)). The petition does not raise the question, and we therefore merely assume, for

the NLRA or as a possible violation rendering the union liable to suit under Section 102 of the LMRDA, close questions may arise: for example, it may be unclear when a particular resignation took effect or whether union discipline was imposed for strike-breaking activities preceding the resignation or for such activities following it. It is noteworthy here that a Regional Director of the NLRB refused to issue a complaint under the NLRA on charges filed by one of the respondents, concluding that the investigation did not show that the fines had been assessed for improper reasons (see pages 3-4, note 6, *supra*).

The penalty under the NLRA for union error in such matters is a remedial order, making whole employees for any injury suffered and directing the union to cease and desist from such conduct in the future. Indeed, the Board is not empowered to enter a punitive order. See, *e.g.*, *Local 60, Carpenters* v. *NLRB*, 365 U.S. 651, 655 (1961). By permitting punitive damages against the Union and two of its officers for fining em-

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purposes of this brief, that the courts below correctly determined that the fines imposed on respondents violated Title I. (Question 2 of the petition (Pet. 3) raises the different question whether—regardless of what a court determines to be a union's real motive for imposing fines—the union cannot be found to have imposed such fines in violation of the LMRDA when the union trial board was presented with "substantial evidence" that the disciplined members "had engaged in unprotected strike-breaking activities.") We also take no position on the question of what aspects of respondents' pre-resignation conduct may have been protected by Title I. The court of appeals concluded (App. A7) that the Union's charges "included pre-resignation conduct that was clearly within the protection of the LMRDA," but the court did not specify what conduct it had in mind. This question also is not raised by the petition.

ployees for the conduct concerned in this case (and permitting such damages even where no consequential damages were shown), the court of appeals established a policy that could well deter unions from taking actions that are lawful under *Allis-Chalmers* and "clearly in the interest" of the membership as a whole (*IBEW* v. *Foust*, *supra*, 442 U.S. at 52), for fear that a district court jury may see the matter differently and make a punitive damage award that would substantially deplete the union treasury.

In this area of overlapping jurisdiction, it would be anomalous to conclude that Congress intended the LMRDA to confer on juries the power to impose the "extraordinary sanction" (*IBEW* v. *Foust*, *supra*, 442 U.S. at 48) of punitive damages for conduct that the Board may redress only by a remedial order. The foreseeable result would be to divert resolution of disputes in this area from the NLRB to untutored juries[12] and, in the long run, to "impair[ ] the usefulness of labor's cherished strike weapon" (*NLRB* v. *Allis-Chalmers Mfg. Co.*, *supra*, 388 U.S. at 183), as well as to inhibit unions from taking other lawful actions enabling them to present a united front to management in their dealings on behalf of the employees they represent.

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[12]The discretion afforded to juries in the award of punitive damages is, as this Court noted in *Foust*, particularly troublesome where the expression of unpopular views is at issue. "Community hostility toward unions" can be potent in the circumstance of an extended economic strike. 442 U.S. at 50–51 n.14. Accord, *UAW* v. *Russell*, 356 U.S. 634, 651 (1958) (Warren, C.J., dissenting).

Of course, if Congress sought to change this labor policy through the LMRDA, then punitive damages that have such inhibiting effects might be appropriate. But the legislative history of the LMRDA suggests that, although Congress wished to prevent, in the most vigorous way permissible, certain types of egregious conduct by union hierarchies and their adherents, including "the denial of democratic processes * * *; the denial of freedom of speech and freedom of assembly * * *; brutal, physical violence, vandalism, instilled fear, and economic coercion, used to silence objectors" (105 Cong. Rec. 6470 (1959), II Leg. Hist. 1097)),[13] it did not intend for Title I to weaken unions in their vital role as the representative of employee interests against management.[14]

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[13] In cases not involving unions as bargaining representatives in their direct dealings with management, there may be circumstances, involving extreme union abuses, where punitive damages would serve the congressional purpose of eliminating corruption and promoting union democracy, without impairing other important policies embodied in the labor laws.

[14] Titles I through VI of the LMRDA stand on a different footing from Title VII in this respect. Titles I through VI, codified at 29 U.S.C. 401-531, impose regulatory standards on the internal operations of unions designed to protect union members in their relationship to the union. See *NLRB* v. *Allis-Chalmers Mfg. Co.*, *supra*, 388 U.S. at 193-194. Congress emphasized that these titles were not designed to affect the relationship between the union and the employer: it expressly provided in Section 603(b), 29 U.S.C. 523(b), that nothing contained in Titles I through VI should be construed "to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

In Title VII, which is not involved here, on the other hand, Congress did reach union-employer relations by amending the National Labor Relations Act to tighten pre-existing prohibi-

Thus, as this Court has explained (*NLRB* v. *Allis-Chalmers Mfg. Co.*, *supra*, 388 U.S. at 194), Congress sought in the LMRDA "to protect union members in their relationship to the union by adopting measures to insure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline," but the Senate Report emphasized that "in establishing and enforcing statutory standards great care should be taken not to * * * weaken unions in their role as collective-bargaining agents." S. Rep. No. 187, 86th Cong., 1st Sess. 7 (1959), I Leg. Hist. 403. See also S. Rep. No. 187 at 5, I Leg. Hist. 401. And Senator McClellan, in offering the floor amendment that ultimately led to the addition of Title I to the bill reported by the Senate Committee,[15] disclaimed any such intent: "I do not propose, knowingly, to offer any amendment to the bill which I think would jeopardize, unduly restrain, retard, or hinder the progress, survival, and functioning of honest, decent unions designed to serve the workers." 105 Cong. Rec. 6473 (1959), II Leg. Hist. 1099. See also, *e.g.*, 105 Cong. Rec. 15531 (1959), II Leg. Hist. 1567 (remarks of Rep. Griffin). In its final form, then, Section 101(a)(2) of the LMRDA, 29 U.S.C.

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tions on union use of certain economic weapons regarded as illegitimate, such as the secondary boycott. Not even Title VII, however, was intended to impair the effectiveness of traditional economic weapons such as the right to strike. See 105 Cong. Rec. 15531 (1959), II Leg. Hist. 1567 (remarks of Rep. Griffin): "[I]t should be clear that there is no provision in [the bill] which impairs or affects the right of organized employees to go on strike for better wages and working conditions—and to picket in connection with such a strike."

[15] See page 7, note 9, *supra*.

411(a)(2), which guarantees union members the rights of free speech and assembly, was made subject to the proviso that it should not be construed to impair the union's right to enforce "reasonable rules as to the responsibility of every member toward the organization as an institution."

Therefore, while the congressional purposes expressed in the language and legislative history of the LMRDA may support awards of punitive damages in certain cases of extreme abuse of the principle of union democracy, they strongly indicate that punitive damages should not be available in cases, such as those involving union discipline in the economic strike context, in which the possibility of such awards would chill the exercise of unions' rights to take lawful actions to advance their members' interest in contract negotiations and other disputes with management. This proposition is in harmony with existing precedents, both this Court's decision in *Foust* and decisions of the courts of appeals under the LMRDA.

The decision by the court below is the first to award punitive damages under Title I for discipline imposed in aid of the preservation of the union's strike weapon. The other decisions in which the courts of appeals have permitted punitive awards against unions have uniformly involved purely internal disputes, in which the union imposed sanctions against members whose conduct did not interfere with the union's representation of the collective interests of all members against the employer. Each of the courts of appeals to have passed on the question in the context of internal union affairs has held that punitive damages may be recovered

where the union's conduct is egregious. See *International Brotherhood of Boilermakers* v. *Braswell*, 388 F.2d 193, 199–201 (5th Cir.), cert. denied, 391 U.S. 935 (1968); *Cooke* v. *Orange Belt District Council of Painters No. 48*, 529 F.2d 815, 820 (9th Cir. 1976); *Morrissey* v. *National Maritime Union*, 544 F.2d 19, 24–25 (2d Cir. 1976). These courts have reasoned that punitive damages serve an important purpose in deterring violations of Title I and effectuating the congressional objective of eliminating abuses and promoting democratic self-government in unions. We do not here take issue with that reasoning, since such cases can be treated as an exception to the rule laid down in *Foust*.[16]

In sum, although the court below purported to apply precedent from other circuits, it in fact extended the law in such a way as to conflict with this Court's decision in *Foust*. Moreover, although there is no direct conflict among the circuits, the question of the availability of punitive damages under Title I has aroused,

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[16] Unlike the fair representation suits considered in *Foust*, the fundamental purpose of Title I is not merely to compensate for private wrongs, but to provide a mechanism for eliminating serious abuses deemed injurious to the rights and interests of the public and employees generally. Cf. *Hall* v. *Cole*, *supra*, 412 U.S. at 8:

> [B]y vindicating his own right of free speech guaranteed by § 101(a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others.

as the court below noted, "much controversy" (App. A9). Thus, as the Sixth Circuit recently acknowledged, its earlier decision in *McCraw* v. *United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry*, 341 F.2d 705 (1965), while not directly ruling on the point, "strongly suggested" that punitive damages could not be awarded for violations of Title I. *Shimman* v. *Frank*, 104 L.R.R.M. 2440, 2455 (6th Cir. May 21, 1980).[17] Following *Foust*, the uncertainty in this area of the law has undoubtedly increased. In *Shimman*, the Sixth Circuit speculated that the rationale of *Foust* also extended to Title I suits, but declined to rule on the question, concluding only that the issue is "uncertain" in light of *Foust*. 104 L.R.R.M. at 2455–2456. Accordingly, we believe the Court should grant certiorari to clarify the important questions of national labor policy presented by the award of punitive damages in the circumstances of this case.

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[17] In *McCraw*, the Sixth Circuit held that damages recoverable under Title I are limited to those that directly and proximately result from the violation. 341 F.2d at 710. The Fourth Circuit endorsed this view in *Simmons* v. *Avisco, Local 713, Textile Workers*, 350 F.2d 1012, 1018–1019 (1965). However, although the district courts in those cases had ruled that punitive damages were not available under Title I, that precise question apparently was not presented on appeal.

CONCLUSION

The petition for a writ of certiorari should be granted as to Question 1.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO LOCAL 1969, et al.,
Petitioners,

VS.

REBECCA BISE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Respondents respectfully submit this brief in response to the views of the United States as expressed by the Solicitor General.

STATEMENT

The Solicitor General's statement regarding the facts in this case completely ignores the malicious, oppressive

and bad faith conduct of the Petitioner union[1] and the lack of evidence presented at trial to support the alleged violations of the union constitution. Respondents respectfully refer the Court to the Statement of the Case contained in their Brief in Opposition.

DISCUSSION

I

THE RULE OF FOUST SUPPORTS THE JUDGMENT HEREIN

In its brief, the Solicitor General's office states that its opinion regarding the availability of punitive damages under 29 U.S.C. 412 is based on this Court's decision in *IBEW v. Foust,* .... U.S. ...., 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979) (Solicitor General Brief, p. 8). The brief further states that in *Foust*:

> "This court was required to determine whether the availability of punitive damages for a breach of the duty of fair representation would effectuate the purposes of the Railway Labor Act, which are to facilitate collective bargaining and to achieve industrial peace." ibid.

Accordingly, to be consistent with *Foust,* the instant case requires a determination whether the availability of punitive damages for violation of the rights given to union members under the LMRDA would effectuate the purposes of that act.

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[1]The jury, in response to Special Interrogatories, found specifically that the defendants did act "maliciously, oppressively and in bad faith in charging and trying the plaintiffs" Bise, Bradley, Carr, Kaona, Klatt, Ornellas, Pappas and Maxine Stones. (Clerk's Record, pp. 937-952)

Fortunately, said purposes are not a subject for conjecture having been explained in the case of *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) as being:

> "*to protect union members* in their relationship to the union by adopting measures to ensure the provision of democratic processes in the conduct of union affairs and procedural due process to members subjected to discipline." *Allis-Chalmers,* supra, at 194. (Emphasis supplied)

It may be seen that the declared purpose of the LMRDA is to protect union members and not unions, and it is too plain for argument that an award of punitive damages would effectuate that purpose. The potential for exposure to punitive damages is a most powerful guaranty of those rights sought to be protected. The purpose of punitive damages is "to punish reprehensible conduct and to deter its future occurrence." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 350 (1974).

Therefore, the application of the *Foust* standard of determining whether the award of punitive damages would further the purposes of the LMRDA would result in the same outcome as that reached by the district court. Contrary to the opinion of the Solicitor General that *Foust* requires an opposite result, that case is in actuality a strong support for the judgment of the district court. Furthermore, there is some question as to whether *Foust* is applicable herein. That case did not involve an action authorized by statute:

> "We are concerned here with judicially created remedies for a judicially implied cause of action." *Foust,* supra, fn. 9.

The instant case presents an opposite situation, the cause of action is created by statute, as are the remedies.

Therefore, whether *Foust* is viewed as being controlling or not on point, the propriety of the award of punitive damages herein is not affected by that decision. The statement by the Solicitor General's office that those cases permitting the recovery of punitive damages, such as *Boilermakers v. Braswell,* 388 F.2d 193 (CA5), cert. denied, 391 U.S. 935 (1968) are exceptions to the rule laid down in *Foust* (Solicitor General's brief, p. 17) is clearly erroneous.

II

THE RECOVERY OF PUNITIVE DAMAGES IS AUTHORIZED BY 29 U.S.C. 412

Under the above-mentioned statute, courts may grant "such relief (including injunctions) as may be appropriate" for violations of Title I of the LMRDA. How this language could have possibly been changed to give more latitude to the courts has not been suggested by any party to this litigation. Yet, the Solicitor General's office suggests that it was the intent of Congress that punitive damages not be available under this statute. (Solicitor General brief, p. 14.) This contention would seem to be difficult to support, for when Congress does not wish punitive damages to be available on a particular cause of action, it has not been bashful about explicitly stating that such is the case. See for example, 28 U.S.C. 2674, which specifically provides that the United States shall not be liable for punitive damages in actions under the Federal Tort Claims Act.

The amicus brief goes on to express concern over the "risk of endangering the financial stability of unions" (page 9) that is posed by the availability of punitive damages citing the case of *Gertz v. Robert Welch, Inc.*, supra. This reliance is strangely placed, for *Gertz* permits the recovery of punitive damages against a newspaper where a defamation has been knowingly and intentionally published, *Gertz*, supra, at 350, while the position of the Solicitor General's office is that this remedy is not available for even the most flagrant violation of the rights of union members if done "in the economic strike context" (Brief, p. 16). This position would bring about the illogical result that the exercise of the right of free speech is afforded less protection than the suppression thereof. The entire political philosophy and history of this country militates against such a result.

The brief further states that in addition to endangering the financial stability of labor unions, the result reached below would "impair the usefulness of labor's cherished strike weapon" (Page 13). This position is also suspect. The strike that gave rise to this litigation occurred over six years ago. Anyone familiar with the federal courts must acknowledge the absolute impossibility of going to trial and obtaining a final judgment between the commencement and termination of the typical strike. How a damage award long afterwards could affect the conduct of a strike is not explained, but an alternative remedy clearly authorized is not objected to. Injunctions are expressly made available by 29 U.S.C. 412, and the immediacy of this remedy does present the possibility of affecting an ongoing strike. Despite this possibility, Congress intended

that injunctions be available in an action under the LMRDA. This is consistent with Respondents' previous argument that the purpose of the Act was to protect union members and not unions, and is inconsistent with the Solicitor General's office's argument that a remedy that interferes with the ability of a union to strike was not intended by Congress.

For this Court to rule that punitive damages are not recoverable under the LMRDA would be to substitute the judgment of the Supreme Court for that of Congress. Respondents must respectfully submit that under the United States Constitution, the court does not have that power. In the early case of *McCulloch v. Maryland*, 17 U.S. 316, it was contended that the establishment of the Bank of The United States was politically unwise. The opinion of Justice Marshall carefully points out the court's lack of jurisdiction over such a controversy.

> "But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power."

Where, as here, no claim is raised that the statute in question is unconstitutional and its language is plain and unambiguous, requiring no interpretation, it would seem that no question is raised that requires the consideration of this Court. If, as has been suggested, the availability of

punitive damages under the LMRDA is a subject of controversy, that controversy may be easily settled by the denial of the petition for writ of certiorari herein. Such denial is called for by virtue of the governing statute and case law, and the application of logical reasoning, as Respondents have attempted to demonstrate. It is respectfully urged that the petition herein be denied.

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Respectfully submitted,

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